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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1711

MIDDLESEX COUNTY SEWERAGE AUTHORITY, PASSAIC VALLEY SEWERAGE COMMISSIONERS, MIDDLETOWN SEWERAGE AUTHORITY, BERGEN COUNTY SEWER AUTHORITY and THE LINDEN ROSELLE SEWERAGE AUTHORITY,

Petitioners,

v.

NATIONAL SEA CLAMMERS ASSOCIATION, GOSTA LOVGREN, CITY OF NEW YORK, HONORABLE ABRAHAM BEAME, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN, individually and as ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, MARTIN R. HOFFMANN, individually and as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, OGDEN R. REID, individually and as COMMISSIONER OF THE NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DAVID J. BARDIN, individually and as COMMISSIONER OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, WEST LONG BEACH SEWER DISTRICT, COUNTY OF WESTCHESER, DEPT. OF ENVIRONMENTAL FAC., CITY OF LONG BEACH AND CITY OF GLEN COVE and THE JOINT MEETING OF ESSEX AND UNION COUNTIES,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Middlesex County Sewerage Authority, Passaic Valley Sewerage Commissioners, Middletown Sewerage Authority, Bergen County Sewer Authority and Linden Roselle Sewerage Authority petition for the issuance of a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The opinion of the Court of Appeals, filed February 5, 1980, is as yet unreported (App. pp. 1a, *et seq.*). The opinion of the United States District Court for the District of New Jersey, filed August 14, 1978, is unreported (App. pp. 49a, et seq.). The judgments of the Court of Appeals (App. p. 37a) and the District Court (App. p. 68a, et seq.) are set forth in this Appendix.

Jurisdiction

Jurisdiction of this Court is pursuant to 28 U.S.C. §1254 (1). Jurisdiction of the Court of Appeals was pursuant to 28 U.S.C. §1291.

The grounds of jurisdiction of the District Court invoked by plaintiffs, to the extent that they were sustained by the Court of Appeals in reversing the dismissal of the action by the District Court, are based upon the Federal Water Pollution Control Act, as amended, 33 U.S.C. §1251, et seq. (FWPCAA), the Marine Protection Research and Sanctuaries Act of 1972, as amended (33 U.S.C. §1401 et seq.) (MPRSA), 28 U.S.C. §1331 (a) and 28 U.S.C. §1333.

Questions Presented for Review

1. Whether the failure of a plaintiff to give the statutory sixty-day notice of intention to institute a civil action based on the Federal Water Pollution Control Act as amended (FWPCAA), 33 U.S.C. §1251 *et seq.*, §1365, and on the Marine Protection Research and Sanctuaries Act (MPRSA), 33 U.S.C. §1401 *et seq.*, §1415, is not fatal to a claim for relief under those statutes asserting damage from ocean pollution.

2. Whether a private citizen may maintain a claim in federal court under 28 U.S.C. §1331 against a state government agency engaged in sewage disposal for relief for ocean pollution damage on the basis of a federal common-law tort of nuisance; whether in any such suit the relief may encompass pecuniary damages.

3. Whether any claim for pollution of ocean waters on the basis of a federal common-law tort of nuisance, if available to a private citizen, is not preempted by the present comprehensive regulatory scheme in respect of ocean pollution constituted by FWPCAA and MPRSA (including its 1977 amendment) and administrative regulations adopted thereunder.

4. Whether an action by New Jersey citizens for damages for tortious injury arising out of ocean pollution against a New Jersey state sewerage agency is maintainable in a federal court, under either the maritime or admiralty jurisdiction or under 28 U.S.C. §1331 founded on a federal common-law tort of nuisance, if there has been a failure on the part of the plaintiffs to serve the agency with a timely notice of claim as required by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*

5. Whether any tort claim for damages against a New Jersey sewage disposal agency, whatever the jurisdictional

basis for maintaining such an action in a federal court, is not offensive to the Eleventh Amendment in light of the sovereign immunity of such agencies as arms of the State of New Jersey under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.,* the limited waiver of such immunity by said statute and plaintiffs' failure to comply with the statutory conditions of such waiver.

Constitutional and Statutory Provisions Involved

The constitutional provision involved is the Eleventh Amendment to the United States Constitution.

The statutoy provisions involved are the Federal Water Pollution Control Act, as amended, 33 U.S.C. §1251, et. seq. (FWPCAA), the Marine Protection Research and Sanctuaries Act of 1972, as amended (MPRSA), (33 U.S.C. §1401 et seq.), 28 U.S.C. §1331 (a), 28 U.S.C. §1333 and 42 U.S.C. §7604.

The New Jersey statutory provisions involved are the New Jersey Tort Claims Act, N.J.S.A. 59:1-2, 3, N.J.S.A. 59:2-1, N.J.S.A. 59:8-3, N.J.S.A. 59:8-8 and N.J.S.A. 40:14A-7.

The text of the constitutional and statutory provisions involved is set forth in the Appendix (App. pp. 71a, et seq.).

Statement of the Case

This petition for certiorari is filed by a number of New Jersey public sewerage disposal agencies made defendants in the action instituted in the District Court. The petition seeks review of a judgment of the United

States Court of Appeals for the Third Circuit which reversed a judgment of the United States District Court for the District of New Jersey (Honorable H. Curtis Meanor) which dismissed on grounds either of absence of jurisdiction or failure to state a claim upon which relief can be granted the complaint of the plaintiffs seeking both injunctive relief and damages against numerous federal, New York and New Jersey state officials and agencies concerned either with the public disposition of sewage or the administrative regulation of the activities of such agencies. Some of the defendant sewage disposal agencies, including these petitioners, are constituted under New Jersey state authority, others under New York.

The gravamen of the complaint, set forth in eleven counts, is that defendants by acts of commission or omission have caused or permitted the pollution of the Atlantic Ocean resulting in such damage to the marine environment as to have adversely affected plaintiffs' commercial business of fishing, clamming and lobstering in the waters of the ocean.

Petitioners are public instrumentalities of New Jersey created under and pursuant to N.J.S.A. 40:14A-1 et seq., 40:14B-1 et seq. or 58:14-1 et se
Petitioner Middlesex County Sewerage Authority (MCSA) is generally typical of the other petitioners in scope of activity, some of them being smaller and others larger. MCSA is responsible for the sewage disposal of 28 municipalities in and adjacent to Middlesex County and a number of large industries. The population it serves is approximately 600,000. Its capital investment is about $250,000,000 and its operating budget for 1980 is $14,874,000. Its operating expenses are met by local taxes and sewer connection fees charged member municipalities and industrial users. Several of petitioners are undergoing a captial expansion program mandated by state

and federal environmental authorities and partially financed by federal grants pursuant to FWPCAA and MPRSA. In the case of MCSA, the expenses of expansion and rising operating costs have almost doubled charges to users in the past year.

Existing regulations of the United States Department of Environmental Protection (EPA) and the 1977 amendment of MPRSA mandate cessation of ocean dumping of sewage sludge by December 31, 1981, 33 U.S.C. §1412a., and petitioners are in the course of active transition from ocean dumping to landbased alternatives for disposition of such sewage sludge under an approved schedule of interim permits issued by EPA designed to effect such a shift by the stated termination date. Petitioners are subject also to EPA permit control of their discharge of sewage effluent into various stream and the ocean under authority of FWPCAA.

In the instant class action, plaintiffs seek not only judicial abatement of ocean dumping of sewage sludge by petitioners, thereby disrupting the measured progress toward that end now being effected administratively under congressional mandate and direction, but also demand, on behalf of members of the affected class, compenatory damages of $250,000,000 and punitive damages of $250,000,000 from defendants.

Since 1924 municipal sewerage authorities in New York and New Jersey and the Army Corps of Engineers have dumped sewage sludge and dredged materials at a dump site in the Atlantic Ocean approximately 12 miles from New York City. See *USEPA, Environmental Impact Statement on the Ocean Dumping of Sewage in the New York Bight* (Final Statement, September, 1978, p. 17) ("EIS"). Ocean dumping of wastes began to be regulated federally in 1899, Refuse Act, 33 U.S.C. §407, and

under earlier versions of FWPCAA, *i.e.* Act of June 30, 1948, c. 758. Such federal regulation was vastly expanded during the last decade by the 1972 amendments of FWP CAA, the adoption in 1972 of the MPRSA and the 1977 amendment of that act, noted above, mandating termination of dumping of sewage sludge in the ocean by December 31, 1981.

Under the Refuse Act, the Army Corps of Engineers was authorized to grant dumping permits. But under the more recent FPWCAA and MPRSA legislation the permit-issuing authority was transferred to EPA and specific criteria for the issuance of permits were established administratively. 33 U.S.C. §1251 et seq., 33 U.S.C. §1401 et seq., 40 C.F.R. Parts 220 to 229.

In 1974 EPA undertook a study to determine whether the sewage dumping site in the New York Bight (12 miles off Ambrose Light) should be relocated. EIS, *supra,* p. 1. A draft Environmental Impact Statement was issued in early 1976. In the summer of 1976 there was a fish kill off the New Jersey coast which constitutes the basis for the complaint of the plaintiffs herein. The fish kill was the subject of comprehensive federal, state and local investigations which concluded that ocean dumping of sewage sludge was only a minor contributing factor. EIS, *supra,* pp. 54-61. That isolated phenomenon led EPA to make further studies on the ocean dumping situation, resulting in a new EIS in 1978. That reached the conclusion that under all the attendant circumstances the most advisable course of action was for the continuance of ocean dumping of sewage sludge at the present site but with encouragement for the construction of improved sewage treatment plants to minimize marine damage. EIS, *supra,* pp. 62-82, 203-207. Several of petitioners have recently substantially improved their sewage treatment processes.

Insofar as concerns these petitioners, the disposition of the issues presented on defendants' motions to dismiss by the lower courts was as follows.

As to the claims asserted under FWPCAA and MPRSA, the District Court held that the claims must be dismissed because of failure of timely service of notice on the defendants prior to institution of the action, as required by the respective statutes (App. p. 56a). On this issue the Court of Appeals reversed, holding that absence of notice was not fatal because of the "savings clause" of the citizens action provisions of the statutes which preserves any existing right of action under statute or common law (App. p. 10a). As to plaintiffs' contention that, independent of any right of action under the express citizens' suit provisions of FWPCAA and MPRSA, they could maintain the suit pursuant to (a) an implied right of action under those statutes and (b) the theory of federal common-law nuisance, relying primarily on *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), the District Court held that the latter remedy was available only in favor of states, not private parties, and that the notice provisions of the statutes remained applicable to any actions brought under the "savings clause." (App. p. 47a). The Court of Appeals reversed these determinations, holding that a private federal common-law nuisance claim was available under the *Illinois* case and an implied claim under FWP CAA and MPRSA as well. (App. pp. 28a-29a, 6a-14a).

As concerns plaintiffs' reliance upon admiralty and maritime jurisdiction of the federal courts, the District Court held that there was a failure to plead a cause of action cognizable under such jurisdiction. The court alternatively held that even if the complaint was read to encompass a substantive claim under such jurisdiction, it would have to be dismissed for failure of compliance with the

notice requirements of state tort claims statutes (excepting in the case of New York City). (App. pp. 62a, 63a). The Court of Appeals held that a more liberal reading of the complaint was required at the pleading stage and that the asserted cause of action was viable although essentially identical with the federal common-law tort nuisance claim. (App. pp. 29a-31a). However, the Court of Appeals failed to deal with the alternative rejection of the maritime tort claim by the District Court based upon failure to meet the notice requirements of the state tort claims statutes.

Petitioners sought on appeal to sustain the judgment of the District Court, insofar as the complaint demands money damages, on grounds of sovereign immunity under the Eleventh Amendment. That defense asserts that in and by the enactment of the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*, the State had vested each of petitioners as a "public entity" with conditional sovereign immunity and that plaintiffs had not met the statutory conditions of pre-suit notice of claim for waiver of such immunity. The Court of Appeals summarily rejected the sovereign immunity defense, citing no cases but only N.J.S.A. 40:14B-4* and N.J.S.A. 58:14-2 and noting that the defendants were municipal corporations (App. p. 36a).

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* Petitioners are created pursuant to either N.J.S.A. 40:14A-1 et seq., N.J.S.A. 40:14B-1 et seq. or N.J.S.A. 58:14-1 et seq. All have power to sue or be sued. The Court of Appeals may have thought the suability of such an agency, see N.J.S.A. 40:14A-7, settled the matter of sovereign immunity. We will demonstrate *infra*, pp. 27-28, that New Jersey law is to the contrary.

ARGUMENT

Petitioner advances the following reasons for the allowance of certiorari.

A.

The holding of the Court of Appeals that failure of plaintiffs to give the statutory notice of intention to institute a complaint based on the Federal Water Pollution Control Act (FWPCA) 33 U.S.C. §§1251 *et seq.*, 1365, and on the Marine Protection, Research and Sanctuaries Act (MPRSA) 33 U.S.C. §§1401 *et seq.*, 1415, is not fatal to claims for relief under those statutes, is erroneous; and the Courts of Appeals are in conflict on the issue, rendering review by this Court highly desirable.

In making the present point it will suffice to cite the citizens suit provisions of FWPCAA since substantially similar provisions are contained in MPRSA.

So far as pertinent to the instant dicussion, 33 U.S.C. §1365 is to the following effect:

> "(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order isued by the Administrator or a State with respect to such a standard or limitation, or
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, * * *

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard of limitation or to seek any other relief (including relief against the Administrator or a State agency)."

The District Court held, and it is not disputed, that plaintiffs failed to comply with the notice requirement of

paragraph (b) of the foregoing section in respect of any petitioner. It is consequently clear that on the face of the statute this action, to the extent that it purports to be based on FWPCAA and MPRSA, is untenable as against petitioners.

The Court of Appeals held that the action nevertheless remained viable under these acts by virtue of the "savings clause" illustrated by paragraph (e) of §1365* which states that nothing in the section "shall restrict any right which any person * * * may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief * * *".

Under that entry wedge the Court of Appeals drew an implication of a general FWPCAA and MPRSA federal cause of action on behalf of private parties, free of the notice requirements of those acts, under the rationale of the line of cases represented by *Cort* v. *Ash,* 422 U.S. 66 (1975) and *Touche-Ross & Co.* v. *Redington,* U.S. , 61 L. Ed.2d 82 (1979) (App. pp. 14a-15a). As the Court of Appeals conceded, however, the *Touche-Ross* decision subordinates the so-called four-part test of *Cort* v. *Ash* in favor of seeking out the underlying congressional intent as to whether a private remedy based upon the policy of the statute was to be permitted. 61 L. Ed.2d at 95-96. We submit that all of the available indicia of intent, both on the face of the statutes and extrinsic thereto, render evident a contrary intent.

As to the evidence on the face of the statute, the error in the Court of Appeals rationale is obvious. Paragraph (e) does not purport to provide an additional remedy *under FWPCAA* (or MPRSA) but merely to save from any arguably preclusive effect of the remainder of the

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* The parallel provision of §1415 is paragraph (g)(5).

section any cause of action for relief which a person might have under any other statute or under common law. Whether there is indeed *any other* statutory or common-law right to relief available to plaintiffs against petitioner, independent of FWPCAA and MPRSA, is a distinct question to be addressed under Reason B hereinafter. For present purposes, the point is that there is no tenable hypothesis for positing congressional intent for additional FWPCAA or MPRSA causes of action under §1365 or §1415. Indeed, the Senate report on the FWPCAA bill explained, in reference to the savings clause:

> "It should be noted * * * that the section would specifically preserve any rights or remedies *under any other law.*" (emphasis supplied)
>
> S. Rep. No. 414, 92nd Cong., 1st Sess., Reported in 1972, U.S. Code Cong. & Ad. News 3668, 3746.

The Court af Appeals alluded to this history but dismissed it with the conclusional observation that the court was "not persuaded that this paraphrase of the wording of the Act was intended to preclude the finding of a private remedy under the Act." (App. p. 16a) We respond: Why not? The act fashions a specific citizens remedy and saves any private remedies which may exist under any other act or common law. What basis remains for implying yet another remedy under the act itself?

To buttress its contention of a general private cause of action under FWPCAA, the Court of Appeals labors to establish a rationale of entitlement to an action by *non-injured* citizens under §1365 (a) (1) and of a companion species of action by *injured* citizens under paragraph (e) of the section. It bases the distinction upon legislative history supposedly designed to meet the decision of this court in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). (App.

p. 7a). But the thesis does not withstand scrutiny of the statutory language. Concededly *Sierra Club* held that review of federal agency action by parties who could not show injury was not available under the Administrative Procedure Act. However, the definition in §1365 (g) of a "citizen" who is permitted to institute a civil action under paragraph (a) is "a person or persons having an interest which is or may be adversely affected." That definition tracks the *Sierra Club* language concerning injured persons (the suitor must show "that he is himself adversely affected." 405 U.S. at 740). It is thus clear that section (a) actions may be brought only by injured persons, contrary to the thesis of the Court of Appeals, and the supposed distinction advanced to support its holding that there is a private action independent of paragraph (a) does not stand up.

In Reason B hereinafter, in the course of refuting the thesis of the Court of Appeals that §1365(e) contemplates a residual federal common-law nuisance action for the benefit of private plaintiffs, we have advanced additional reasons why it is unsound to imply from the statute an intent to permit a private cause of action under §1365 other than the specific citizens remedy afforded by paragraph (a), requiring prior notice to the defendants. We incorporate such argument under the present Reason by reference.

It is earnestly submitted that the composite consideration reflective of legislative intent militate against any notion of a design to provide any private cause of action *based upon* FWPCAA and MPRSA.

We consequently urge that to the extent that the present action is posited upon either of the federal environmental statutes cited it must fall for failure to give the notice required by paragraph (b) of FWPCAA and (g)(2) of MPRSA.

The best reasoned prior decision on the point is *City of Highland Park* v. *Train,* 519 F.2d 681 (7 Cir. 1975), *cert. denied* 424 U.S. 927 (1976). While that case dealt with the Clean Air Amendments of 1970, the decision is in point because the Clear Air statute is essentially the same as those here under consideration in respect of the notice requirement. See 42 U.S.C. §7604. The court held the failure to give statutory notice to be fatal to the action there involved. It pointed out that although there was clear indication of legislative intent to allow citizen participation in the enforcement of the act, the legislative history also demonstrated:

> "that Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief. It was in response to these concerns that the statutory notice provisions were included in section 304. Congress's intention would be frustrated if the statutory mandate of section 304(b) were ignored." (footnotes omitted) 519 F.2d at 690-691.

Concededly contrary decisions have been rendered by two other Courts of Appeals. *Conservation Soc. of S. Ver. Inc.* v. *Secretary of Tran.,* 508 F.2d 927, 938 (2 Cir. 1974); *Natural Resources Defense Council, Inc.* v. *Train,* 510 F.2d 692 (D.C. Cir. 1975); *Natural Resources Defense Council, Inc.* v. *Callaway,* 524 F.2d 79 (2d Cir. 1975). A close reading of these opinions fails to reveal any satisfying rationale for an interpretation of the statutory savings clause which would depart from its plain facial significance as reserving *any other* existing remedies rather than, as held in these cases, creating another remedy under and pursuant to the statute in which the savings pro-

visions were incorporated. This same observation is fully applicable to the reasoning of the Court of Appeals in the instant case.

In view of the highly significant public policy aim served by the statutory requirement of notice, particularly in relation to the federal officials charged with enforcement of these comprehensive environmental statutes, and the unwarranted deprecation of the notice requirement by the determination of the Court of Appeals in this case, it is eminently desirable that this Court take this case to resolve the conflict among the Courts of Appeals on the issue.

B.

The holding of the Court of Appeals that a private citizen may maintain an action under 28 U.S.C. §1331 against a state governmental agency for pollution of ocean waters on the basis of a federal common-law nuisance theory is erroneous; and the federal courts of appeals are now in conflict on the issue, rendering review by this Court highly desirable.

1. Significance of Illinois v. Milwaukee.

The crux of the difference between the District Court and the court of Appeals with respect to the issue stated is whether this court in *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972), intended to announce a federal common-law nuisance action for water pollution against public sewerage agencies available under 28 U.S.C. §1331 to private citizens as well as to states. It was the view of the District Court that the remedy was confined to states as plaintiffs; of the Court of Appeals, that it extended to private complainants as well. This is an issue on which the Court of Appeals is in conflict with other courts of appeals.

In agreement with the District Court in this case are the holdings in *Committee for Con. of Jones Falls Sewage System* v. *Train,* 375 F.Supp. 1148 (D. Md. 1974), affirmed on other grounds consistent with that of the District Court on the instant issue, 539 F.2d 1006 (4 Cir. 1976) (en banc); *Parsell* v. *Shell Oil Co.,* 421 F.Supp. 1275 (D. Conn. 1976), aff'd without opinion *sub nom. East End Yacht Club, Inc.* v. *Shell Oil Co.,* 573 F.2d 1289 (2 Cir. 1977); *cf. Highland Park* v. *Train, supra,* (519 F.2d 681). The only contrary view we have found, supportive of the Court of Appeals in this case, is *Byram River* v. *Village of Port Chester,* 394 F.Supp. 618 (S.D.N.Y. 1975).

A careful analysis of *Illinois* v. *Milwuakee* is convincing that the court's declaration of the availability of a federal common-law nuisance claim was actuated by the felt need to afford the State of Illinois a remedy for pollution of its waters emanating from beyond its borders. In developing its rationale the Court relied heavily upon the comparable decisions in *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907) and *Texas* v. *Pankey,* 441 F.2d 236 (10 Cir. 1971). 406 U.S. at 100-104. In *Illinois* the Court quoted with approval from *Texas* v. *Pankey, supra* (441 F.2d at 240) as follows:

> "As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States."
>
> 406 U.S. at 99-100.

Federal common law necessarily evolves on a case-by-case basis.* Sound principles of judicial evolution of the federal common law in the vital environmental area should, we respectfully submit, proceed narrowly and avoid untoward conflict with or frustration of existing regulatory legislation pertaining to the same subject matter. From that point of view, *Illinois* v. *Milwaukee* should not at this time be expanded beyond its apparent motivating rationale—*i.e.*, to afford a state or a litigant representing a state's interest (*cf. Hinderlider* v. *La Plata R. & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)) the legal protection against pollution emanating from beyond the state's borders required by the inability of states in this federal union otherwise to be relieved from such harm. Insofar as affording citizens a remedy against the kinds of harm sued for in this case (*i.e.* at the hands of public sewerage agencies) the citizens' suit provisions of FWPCAA and MPRSA were envisaged by Congress to be both appropriate and adequate and the ~~noted~~ notice provisions thereof to be integral to the remedy afforded. The savings clauses in both of the cited statutes could well have merely contemplated saving the continued availability of actions in state courts whether based on statute or common law or in federal courts on whatever residual basis might exist not incompatible with the legislative policies underlying these specific enactments.

In *Committee for Con. of Jones Falls Sewage System* v. *Train*, *supra*, the court observed that the plaintiffs in the two principal cases cited in *Illinois* v. *Milwaukee* were states and that each of those cases "indicates that the character of the plaintiffs as governmental units was integral to the determination that a federal cause of action

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* See Friendly, "In Praise of *Erie*—and of the New Federal Common Law," 39 *N.Y.Univ.L.Rev.* 383, 405 *passim* (1964).

existed." 375 F.Supp. at 1153. Although affirming the determination of the District Court in that case on other grounds, the Court of Appeals for the Fourth Circuit on appeal therefrom rendered its independent analysis of *Illinois* v. *Milwaukee* and *Texas* v. *Pankey* as developing "[o]f necessity** a body of federal common law for the resolution of interstate pollution controversies when a state sought extra-territrial relief on behalf of her citizens." 539 F.2d at 1008. The court further observed that:

> "Perhaps with the exception of actions by the United States to abate public nuisances created in navigable waters by polluters, [citing cases] but consistent with §1251(b) [FWPCAA] the doctrine of *Illinois* v. *Milwaukee* has not been extended beyond the abatement of public nuisance in interstate controversies where the complainant is a state and the offenders are creating extra-territorial harm." (f.n. omitted) (per Haynsworth, C.J.)
> 539 F.2d at 1009.

Similarly emphasizing the significance of the character of the plaintiff in *Illinois* v. *Milwaukee* and in the cases there relied upon is *Parsell* v. *Shell Oil Co.*, 421 F.Supp. at 1280-1281 (aff'd without opinion, 573 F.2d 1289).

The Court of Appeals in the instant case lays stress (App. p. 25a) upon footnote 6 in *Illinois* v. *Milwaukee*, 406 U.S. at 105, to the effect that:

> "Thus, it is not only the character of the parties that requires us to apply federal law**[W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law."

The implication of the Court of Appeals is that the footnote indicates that a state party plaintiff is not essential to the federal common-law nuisance action if the substantive federal question implicated is one calling for doctrinal uniformity. That thesis was refuted in the District Court opinion in *Committee for Con. of Jones Falls Sewerage System* v. *Train, supra,* 375 F. Supp. 1148), where the court in dealing with the same *Illinois* footnote said:

> "'it is not only the character of the parties that requires us to apply federal law.' This statement can be read in at least two different ways. It could mean a) that there were other considerations sufficient in themselves to require application of federal law, or b) that there were other federal interests which in addition to the character of the parties required the application of federal law although those other interests in themselves would not have been sufficient. In the view this Court takes of the basis for the Supreme Court's decision, the latter interpretation is the proper one."
> 375 F.Supp. at 1154, n. 12

We submit that the foregoing analysis should be accepted by this Court as a sound explanation of the mooted footnote in *Illinois.* If the *Illinois* court had intended the newly announced federal common-law nuisance action to be available to private parties it is highly unikely that the opinion would have failed so to state explicitly.

2. *Any pre-existing theory of federal common-law nuisance by a private party against a public sewerage agency should be deemed pre-empted by the enactment of the 1972 Amendments of FWPCA, of MPRSA as amended in 1977, and of the administrative regulations adopted by EPA pursuant to both acts.*

In *Illinois* the Court made the prescient observation that

> "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution." 406 U.S. at 107.

When *Illinois* was decided the 1972 amendments of FWPCA had not yet come into effect nor had Congress enacted MPRSA. The present scope of these statutes and of the extent and effect of the administrative regulations adopted by EPA pursuant thereto effectively subjects petitioner[9] and similar potential water polluters to the closest and most detailed scrutiny and oversight readily conceivable. Every single pipe ("outfall") which can discharge pollutants into a navigable body of water must be approved by EPA. That agency also has the power and duty to impose stringent limitations on the content of those discharges and the manner in which they must be treated. The FWPCA amendments declare unlawful the discharge of any potential pollutant unless it complies therewith. 33 U.S.C. §1311(a).

Prior to the 1972 amendments of FWPCA the Administrator was required to prove individual responsibility for violations of water quality standards before establish-

ing criteria for discharges. The amendments mandated that the Administrator establish discharge standards in the first instance and take action against any point source in violation. §§1311, 1316, 1317.

The 1972 amendments establish a comprehensive licensing program under which no discharge into navigable body of water, whether by a municipality or by others, is permitted except pursuant to permit. §§1341, 1345. The amendments create a timetable for the elimination of water pollution. §1311. Municipal sewer systems must employ the best practicable waste treatment technology by July 1, 1983. Limited discretion is given the Administrator to modify requirements if specific stringent conditions are met. §1311(h). There are various additional regulatory modes and controls incorporated in the Act to achieve minimal water pollution as soon as practicable.

MPRSA (also known as the Ocean Dumping Act) prohibits the dumping of any material into ocean waters except as authorized by permit. 33 U.S.C. §1411. Section 1412(a) authorizes the Administrator to issue permits for the dumping of any material other than dredged material* where he determines that such dumping will not unreasonably degrade or endanger human health, welfare or amenities or the marine environment, ecological systems, or economic potentialities. The Administrator is directed to consider, in these respects, the need for the proposed dumping, the persistence and permanence of the effects of the dumping, and appropriate locations and methods of disposal, including land-based alternatives and the probable impact thereof upon considerations affecting the public interest. *Ibid.*

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* §1413 establishes a dumping permit program for dredged materials under regulation of the Secretary of the Army.

We have seen above that by amendment of MPRSA in 1977 Congress decreed the termination of all ocean dumping of sewage sludge after December 31, 1981. 33 U.S.C. §1412a.

The act arms the Administrator with ample enforcement powers including that of assessment of civil penalties up to $50,000 for any violation and provides for additional criminal sanctions.

As already noted, these petitioners are now conducting ocean dumping of sewage sludge under interim permits conditioned upon compliance with schedules for construction of land-based alternatives which call for cessation of ocean dumping of sewage sludge by December 31, 1981.

In light of all the foregoing, it is earnestly submitted that the preconditions for declaration of statutory preemption of the putative federal common-law nuisance action in this area, as envisaged by the statement in *Illinois* v. *Milwaukee* qouted above, has arrived. It would seem intolerable that a public agency so vitally serving the public health and welfare and so closely regulated in all of its operations by both federal and state statutory and administrative controls as these petitioners should be subjected to the prospect either of a general equity injunction or that of an action for damages demanding many millions of dollars at the instance of private claimants. If these plaintiffs may sue, so may countless others.

The observations of Judge Haynsworth in *Committee for Con. of Jones Falls Sewerage System* v. *Train, supra,* (539 F.2d 1006) seem particularly cogent in this regard. He stated:

> "Indeed, it would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the 1972 Act of Congress

> legitimates. The defendants are in compliance with the statute. They are operating under a permit issued in accordance with the statute and the authorization of the Environmental Protection Agency. The Congress and the Executive Department, acting through the Environmental Protection Agency, have declared their conduct lawful until the time for the application of more restrictive standards." *Id.* at 1009.

It is consequently submitted that Congress has by the enactment of the amendments to FWPCAA and of MPRSA and the creation of the comprehensive regulatory scheme thereunder preempted any general federal tort claim against petitioners in respect of conduct regulated thereby. Certiorari should issue to settle this all-important public law question and furnish guidance to the federal courts as to the present-day significance of *Illinois* v. *Milwaukee.*

3. *Illinois v. Milwaukee authorizes only an injunction, not damages.*

Whatever may be thought of the contentions advanced in the two subpoints hereinabove, there can be no dispute but that *Illinois* v. *Milwaukee, supra,* is authority only for a federal common-law nuisance action to abate a nuisance and not for damages. Abatement of the nuisancce was all the complaint demanded. 406 U.S. at 93. The entire rationale of the decision was the need of a state for abatement of pollution emanating from beyond the borders of that state. The Court, in discussing the criteria for adjudication in such suits stated: "There are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern."

406 U.S. at 107-108. Thus to the extent that *Illinois* v. *Milwaukee* is authoritative in this litigation it does not support the damages claims asserted by plaintiffs in this case. This Court should issue its writ both to reaffirm that important principle, which has been misconceived by the Court of Appeals, and to exercise its supervisory function over the lower federal courts.

C.

Any tort claim for damages against the New Jersey sewage disposal agencies, including any based on a federal common-law nuisance claim, is barred by the Eleventh Amendment and/or the New Jersey Tort Claims Act since those agencies by New Jersey law partake of New Jersey's sovereign immunity, and the waiver of such immunity here is predicated on conditions which plaintiffs have not satisfied. Due respect for States under appropriate principles of federalism bespeaks review of this issue by this Court, the Court of Appeals having resolved it erroneously.

1. As to immunity under the New Jersey Tort Claims Act. N.J.S.A. 59:1-1 et seq. (L. 1972, c. 45).

To the extent that the instant action is one seeking damages on any tort theory petitioners are public entities of New Jersey upon which the State of New Jersey by the cited statute has conferred qualified immunity. The Court of Appeals has erroneously rejected this contention by the unsupported blanket assertion that "the State Tort Claims Act may not pre-empt federal statutory or common-law causes of action". (App p. 35a, n. 49). We concede this statement is true as to actions for an injunction but submit it is incorrect insofar as it concerns actions for damages. See N.J.S.A. 59:1-4, which restricts the effect of the act to tort damages claims.

For present purposes, it makes no difference whether plaintiffs' claim in its damages aspect is posited upon the theories of maritime tort*, federal common-law nuisance or implied federal claim predicated upon FWPCAA or MPRSA. Basically, all three are the same in substance. The claim remains essentially one for damages on account of conduct of defendants hypothesized to be wrongful as a tort.

We are aware of no reported decision sustaining the availability of a tort claim for damages, whether of the federal common-law nuisance genus, implied from a federal regulatory statute or that constituted by the so-called maritime tort, against a state public entity, as against an affirmative legislative declaration of that state immunizing the entity from libility for damages. The contrary holding by the Court of Appeals warrants the supervisory oversight of this Court in the interests of appropriate principles of federalism and due regard for states' rights.

The New Jersey Tort Claims Act, N.J.S.A. 59:2-1, declares that except as otherwise provided by the Act "a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or public employee or any other person." Although the statute contains detailed provisions concerning circumstances in which the tort immunity of a public entity is waived and an action against it is permissible, it is nevertheless also provided that "no actions shall be brought against a public entity under this Act unless the claim upon which it is based shall have been presented in

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* There is no liability premised on maritime tort if the conduct complained of is pursuant to official permit, as here. *Potomac Riv. Ass'n. Inc.* v. *Lundeberg Md. Sea. Sch., Inc.*, 402 F. Supp. 344, 357 (D. Md. 1975).

accordance with the procedure set forth in this Chapter". N.J.S.A. 59:8-3.

Claims are required to be presented to the public entity sought to be sued not later than the 90th day after accrual of the cause of action. N.J.S.A. 59:8-8. A judge is permitted to extend the time for filing of pre-suit notice within one year after accrual of the claim. N.J.S.A. 59:8-9. Absent notice of the claim within the time permitted, "the claimant shall be forever barred from recovering against a public entity". N.J.S.A. 59:8-8.

In the present instance it is undisputed that proper claims were not timely filed by plaintiffs with petitioners and that no timely application for permission to make a late filing was made to the Court. For this reason the District Court declared that plaintiffs were forever barred from bringing the tort claims under the admiralty or maritime jurisdiction of the federal court. (App. p. 63a). We submit this decision was a correct one and that it should extend to all plaintiffs' theories of claim. Cf. *Richie* v. *Cahall,* 386 F.Supp. 1207 (D. N.J. 1974), holding that under the Tort Claims Act the state may not be impleaded as a third party defendant in an auto accident suit in a diversity case.

As pointed out by the New Jersey Supreme Court in *S. E. Friel Co.* v. *N.J. Turnpike Auth.,* 73 N.J. 107, 114 n.3 (1977), prior to the adoption of the New Jersey Tort Claims Act in 1972 it had been held in New Jersey that the legislative empowerment of a public agency to sue or be sued constituted a consent to suits, including tort claims, against any agency so empowered. The Tort Claims Act, however, superseded that rule and restored immunity for such agencies except under the conditions for liability set forth in the act. *Ibid.* The fact that petitioner is a suable

public entity does not deprive it of the qualified immunity of the Tort Claims Act. *Wade* v. *N.J. Tpke. Auth.*, 132 N.J. Super. 92 (L. Div. 1975), approved in *S. E. Friel Co.* v. *N.J. Tunpike Auth., supra,* 73 N.J at 115-116

Thus, independent of any other contention set forth in this petition, the holding in by the Court of Appeals of petitioner on claims for tort damages was erroneous, within any theory of federal jurisdiction, and this Court should issue its writ ot review to settle this novel question for the federal judiciary.

2. *As to sovereign immunity under the Eleventh Amendment*

As shown in subpoint 1 above, it is evident that the State of New Jersey has undertaken to vest petitioners as public entities with qualified immunity from suits for damages. That immunity partakes of the sovereign immunity of the state. It has no other conceptual basis. See N.J.S.A. 59:1-2, by which the Legislature of New Jersey in enacting the New Jersey Tort Claims Act recognized the "inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity", but went on to declare it to be the public policy of the state "that public entities shall only be liable for their negligence within the limtations of this act * * *."

Petitioners are cognizant of the reiteration in recent years by this Court of the rubric that municipalities and political subdivisions or agencies of states do not enjoy tort immunity for purposes of the Eleventh Amendment. See *Monell* v. *N.Y.C. Department of Public Service,* 436 U.S. 658, 690, n.54 (1978); *Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 412 (1978); *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U.S. 274, 280 (1977). How-

ever none of these cases explains why an instrumentality or arm of a state should not partake of the immunity of the state itself from actions by its citizens or those of other states ordained by the Eleventh Amendment, when the State expressly confers its immunity on the instrumentality.* Instead all such asseverations cite as dispositive authority the case of *Lincoln County* v. *Luning*, 133 U.S. 529 (1890). In that case, however, the action involved a suit on a county bond, and in its *ratio decidendi* the Court cited provisions of the Nevada constitution permitting the issuance of such bonds by municipal corporations and the institution of actions thereon. *Id.* at 531. The case was therefore a clear one of state waiver of immunity. The further implication in the opinion that municipalities and counties did not generally constitute the state was not supported except by reference to the incidence of prior suits where the question of immunity was not raised or decided. The holding in *Lincoln County* appears not to go beyond the proposition that where a state permits one of its instrumentalities to be sued on one of its authorized obligations sovereign immunity has been waived.

In *Mt. Healthy City Board of Ed.* v. *Doyle, supra,* in passing upon the question as to whether a municipal board of education was entitled to the bar of the Eleventh Amendment as against an action for damages by a citizen in a federal court, this Court said it would look to state law to see whether "the nature of the entity" was more

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* It would seem anomalous that although a local sewerage authority of a state is deemed an arm of the state for purposes of responsibility of the state to another state for water pollution, *New York* v. *New Jersey*, 256 U.S. 296, 301-302 (1921), such agency should be denied the sovereign immunity of the state in respect of litigation concerning such pollution.

like a political subdivision or municipal corporation than like "an arm of the state". 429 U.S. at 280. Resort to Ohio law in that case led to the conclusion that the defendant board was not deemed an arm of the state. We submit that resort to New Jersey state law establishes that, whatever the semantic characterization of these public entities, the New Jersey Tort Claims Act has conferred upon them the aegis of state sovereignty and consequently state immunity from tort suit except within the conditions expressly specified in the statute for waiver of such immunity. No proper application of the rule of federal supremacy, or any other principle, warrants federal abrogation of such immunity.

We submit that the matter of availability of the Eleventh Amendment as a defense to federal damage suits against New Jersey municipalities invested with the state's sovereign immunity warrants reconsideration by this Court in the light of the argument hereinabove set forth and considerations of due regard for appropriate relationships between federal and state authorities.

CONCLUSION

We respectfully submit that the petition for certiorari should be granted. The legal problems implicated are of the highest degree of public importance. Petitioners as public sewage disposal agencies are performing a public health service of the highest magnitude. Under ever increasing financial and technological difficulties, they are endeavoring to meet their public responsibilities under a scheme of state and federal administrative regulations, authorized by statute, which is far reaching, comprehensive and designed to achieve the maximum freedom from pollution of the interstate waters in the New York metropolitan area by an early date.

Harassment of these agencies at the instance of private parties and organizations in such suits as this one obviously militates against the pursuit by these agencies of the public health and environmental objectives envisaged by the controlling legislation and the administrative regulations adopted and being enforced thereunder.

In these circumstances it is urgently in the public interest that this Court assume jurisdiction of this case and determine whether the federal environmental legislation involved herein does not fairly contemplate that such public sewage disposal agencies as petitioners be free from federal suit except under the precise terms and conditions specified in the legislation for actions by pri-

vate parties against such agencies, particularly that of pre-suit notice of claim.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

(Filed—February 5, 1980)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1360

NATIONAL SEA CLAMMERS ASSOCIATION and GOSTA LOVGREN,

Appellants,

v.

CITY OF NEW YORK, HONORABLE ABRAHAM BEAME, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN, individually and as ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, MARTIN R. HOFFMANN, individually and as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, OGDEN R. REID, individually and as COMMISSIONER OF THE NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW JERSEY DEPARTMENT OF

ENVIRONMENTAL PROTECTION, DAVID J. BARDIN, individually and as COMMISSIONER OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, BERGEN COUNTY SEWER AUTHORITY, THE JOINT MEETING OF ESSEX AND UNION COUNTIES, PASSAIC VALLEY SEWERAGE COMMISSIONERS, MIDDLESEX COUNTY SEWERAGE AUTHORITY, THE LINDEN ROSELLE SEWERAGE AUTHORITY, MIDDLETOWN SEWERAGE AUTHORITY, WEST LONG BEACH SEWER DISTRICT, COUNTY OF WESTCHESTER, DEPT. OF ENVIRONMENTAL FAC., CITY OF LONG BEACH AND CITY OF GLEN COVE.

(D.C. Civil No. 77-0126)

GIBBONS, *Circuit Judge.*

This case comes before us on an appeal by plaintiffs National Sea Clammers Association and Gosta Lovgren from a final order dismissing their complaint. Plaintiffs are an association whose members make their living harvesting fish and shellfish from the water and ocean beds of the Atlantic Ocean near New York and New Jersey, and an individual similarly employed. They sue on behalf of themselves and a class comprising all others similarly situated. Defendants are various federal, state, and local officials and governmental departments that are charged with environmental protection or that are responsible for sewage treatment and disposal.

Plaintiffs' complaint alleged that defendants discharged or permitted the discharge of certain nutrient-rich sew-

age and toxic wastes into the Atlantic Ocean or its tributaries. It further alleged that in 1976 these discharges caused a massive and rapid growth of algae from Long Island to Cape May and extending from a few miles to twenty miles offshore. When this algae mass bloomed and died it allegedly settled on the ocean's floor, and its subsequent decomposition created an anoxia, an oxygen deficiency, in the water near the ocean's floor, which caused death and other adverse effects on marine life, particularly on those life forms, such as shellfish, ill able to flee the afflicted area. Plaintiffs alleged violations of the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4361 (1976), the Federal Water Pollution Control Act, 33 U.S.C. §§1251-1376 (1976 & Supp. I), the Marine Protection Research and Sanctuaries Act of 1972, 33 U.S.C. §§1401-1444 (1976), the Rivers and Harbors Act of 1899, 33 U.S.C. §407 (1976), the New York Environmental Conservation Law, N.Y. Environ. Conserv. §1-0101 (McKinney 1973), the New Jersey Conservation and Development Law, N.J.S.A. 13:10-1 (1968), the federal common law of nuisance, and the fifth, ninth, and fourteenth amendments to the Constitution. Defendants moved for dismissal of all claims on the grounds that the court lacked subject matter jurisdiction, *see* Fed. R. Civ. P. 12(b)(1), or that the plaintiffs had failed to state a claim on which relief could be granted, *see* Fed. R. Civ. P. 12(b)(6). The complaint seeks injunctive relief, damages, mandamus to compel compliance with statutory duties, the imposition of fines and penalties for certain violations, the award to plaintiffs of one half of the fines assessed, and attorneys' fees. The trial court, holding that the submission of affidavits converted the motions into motions for summary judgment, granted defendants' motions as to each cause of action alleged.

The complaint was dismissed, with prejudice, on all claims except for two said to arise under state law which were dismissed without prejudice. This appeal followed. We discuss separately the various legal theories which were pleaded and rejected.

1. *The Federal Water Pollution Control Act*

The district court held that plaintiffs' failure to comply with the notice requirements of the Federal Water Pollution Control Act (FWPCAA)[1] deprived it of jurisdiction to entertain plaintiffs' claim that defendants violated their duties under that Act. Section 505(a) of the FWPCAA grants to any private citizen the right to sue to enforce compliance with effluent standards or limitations, 33 U.S.C. §1365(a)(1), or to compel the Administrator of the Environmental Protection Agency to perform nondiscretionary duties. *Id.* §1365(a)(2). Section 505(b) requires that in suits brought pursuant to subsection (a), 60 days' notice be given to specified parties to the suit.

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[1] The Federal Water Pollution Control Act, 33 U.S.C. §§1251-1376 (1976 & Supp. I) was patterned after the Clean Air Act, 42 U.S.C. §§7401-7642 (1976). As originally enacted it was seriously deficient as a comprehensive regulatory scheme and was substantially amended in 1972. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, *reprinted in* [1972] U.S. Code Cong. & Ad. News 951, *codified in* 33 U.S.C. §§1251-1376 (1976); *see* W. Rodgers, Environmental Law §4.2 (1977). The 1972 amendments created the private right of action here in issue. Although the Act was further amended in 1977, those changes are not relevant to this litigation.

Id. §1365(b).[2] Regulations promulgated by the Administrator define the type and specificity of the notice required. 40 C.F.R. §135.3(A) (1979).

The district court held that the notice provision of section 505(b) was a jurisdictional prerequisite to suit, such that plaintiffs' failure to give notice barred suit under section 505(a), 33 U.S.C. §1365(a). This court has rejected the theory that substantial compliance with the notice requirement suffices to give the court jurisdiction under section 505(a). We require instead strict adherence to the Act's notice provisions for suits brought pursuant to section 505(a). *Loveladies Property Owners Ass'n.* v. *Raab,* 430 F. Supp. 276, 280-81 (D.N.J. 1975), *aff'd mem.,* 457 F.2d 1162 (3d Cir. 1976), *cert. denied,* 432 U.S. 906 (1977). We do not depart from that holding. We note, however, that it would be entirely permissible for this court to adopt the pragmatic approach to interpreting the 60-day notice provision by which we would merely require that sixty days elapse prior to district

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[2] Numerous environmental protection statutes contain citizens' suit provisions, each of which also contains a notice requirement similar to that found in section 505(b), 33 U.S.C. §1365(b). *E.g.,* Toxic Substances Control Act, §§20, 21, 15 U.S.C. §§2619, 2620 (1976); Surface Mining Control and Reclamation Act of 1977, §520, 30 U.S.C. §1270 (1976 & Supp. I); Marine Protection, Research and Sanctuaries Act of 1972, §105, 33 U.S.C. §1415 (1976); Deepwater Port Act of 1974, §16, 33 U.S.C. §1515 (1976); Safe Drinking Water Act, §2(a), 42 U.S.C. §300j-8 (1976 & Supp I); Noise Control Act of 1972, §12, 42 U.S.C. §4911 (1976); Resource Conservation and Recovery Act of 1976, §2, 42 U.S.C. §6972 (1976 & Supp. I); Clean Air Amendments of 1970, §12(a), 42 U.S.C. §7604 (1976 & Supp. I).

court action on the complaint.[3] The purpose behind the notice provision, as the legislative history makes clear, was to afford the Environmental Protection Agency an opportunity to remedy the alleged violation prior to judicial action.[4] Thus, in the instant case, we could adopt the position that the failure of the Administrator to take remedial action during the sixty days after receiving notice of the suit permitted the suit to go forward in district court. We need not pass upon this proposition, however, because of our analysis of the independent significance of section 505(e), 33 U.S.C. §1365(e), the savings clause of the citizens' suit provision.

The district court erred in holding that failure to comply with section 505(b), 33 U.S.C. §1365(b), created an absolute bar to plaintiffs' suit to enforce the provisions of the Act. The citizens' suit provision of the FWPCAA was modeled on a similar provision in the Clean Act Act. *Compare* Clean Air Act §304, 42 U.S.C. §7604 (1976) *with* Federal Water Pollution Control Act §505, 33 U.S.C. §1365

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[3] *See* H.R. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 145-46 (1972), reprinted in *Legislative History of the Water Pollution Control Act Amendments of 1972*, at 328-29 (1973) (hereinafter *Legislative History*) (Senate version, adopted in relevant part by Conference Committee, would require that "no action on a suit may begin for 60 days following notification"). Thus, it appears that the Senate bill envisioned filing of a Complaint prior to the passage of 60 days and intended only to defer action on such a suit.

[4] S. Rep. No. 92-414, 92d Cong., 1st Sess. 79-80 (1972), *reprinted in Legislative History* at 1497-98, *see* W. Rodgers, Environmental Law §1.13 (1976) (discussing prototype citizens' suit provision of Clean Air Act).

(1976 & Supp. I). The slight difference in wording of the citizens' suit provision of each act reflects only the attempt by Congress to ensure that the FWPCAA would comply with the holding of the Supreme Court in the then-recent case of *Sierra Club* v. *Morton,* 405 U.S. 727 (1972).[5] The Senate version of the bill would have permitted any person to sue to enforce the terms of the Act.[6] The House bill would have limited citizens' suits narrowly to suits brought by two types of plaintiffs, citizens of the geographic area who were directly affected by the alleged violation, or groups of persons who, because actively engaged in the administrative process, had shown an interest in

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[5] In *Sierra Club,* the Supreme Court analyzed the requirement of standing in the context of litigation by environmental groups pursuant to section 10 of the Administrative Procedure Act. 5 U.S.C. §702 (1976). The Court held that such an environmental group would have standing if it could allege an adverse effect on its interests, whether economic, aesthetic, conservational or recreational. 405 U.S. at 738. The legislative history of the FWPCAA is replete with references to the *Sierra Club* decision and the issue of whether the general language of the Clean Air Act's citizens' suit provision would withstand judicial scrutiny. *See* notes 8-9 *infra* and accompanying text.

[6] The Senate bill provided that "any person" could commence a civil action to enforce the terms of the Act "without regard to the amount in controversy or the citizenship of the parties." S. 2770, 92d Cong., 1st Sess. §505(a)(1971), *reprinted in Legislative History* at 1703-04. The accompanying committee report likewise employed broad phrasing. *See* S. Rep. No. 92-414, 92d Cong., 1st Sess. 79 (1971), *reprinted in Legislative History* at 1497 ("anyone may initiate a civil suit against" specified parties for specific violations).

the area or the controversy.[7] The Conference Committee chose a middle path, limiting the section 505(a) remedy to citizens, but defining citizen broadly in section 505(g).[8] The intent of Congress was thus to provide generally for citizens' suits which would not be subject to the jurisdictional amount requirement and yet would provide for pri-

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[7] The House bill provided

> Sec. 505.(a) . . . any citizen may commence a civil action on his own behalf . . .
>
> (g) For the purposes of this section the term 'citizen' means (1) a citizen (A) of the geographic area and (B) having a direct interest which is or may be affected, and
>
> (2) any group of persons which has been actively engaged in the administrative process and has thereby shown a special interest in the geographic area in controversy.

H.R. 11896, 92d Cong., 2d Sess. §§505(a), 505(g) (1972), *reprinted in Legislative History* at 1073, 1077.

[8] The final form of the bill reflects the Conference Committee's changes. *See* 33 U.S.C. §1365(g). The Conference Report notes that the change complies with the *Sierra Club* requirements. S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 145-46 (1972), *reprinted in Legislative History* at 328-29. Senator Muskie's somewhat fuller description of the Conference agreement noted that:

> The Conference agreed to define a citizen, for purposes of the citizen suit section of the water bill, as a "person or persons having an interest which is or may be adversely affected."

1 *Legislative History* at 179 (prepared statement of Sen. Muskie) (Oct. 4, 1972).

vate attorney general enforcement to the maximum degree permitted by the Court's *Sierra Club* decision.[9]

It is clear, however, from the legislative history that the section 505(a) remedy is not exclusive. That section was intended to give federal courts jurisdiction over suits by private atorneys general seeking to enforce the provisions of the Act. Thus, the notice provision of section 505(b) only applies when a non-injured member of the public sues to enforce the Act. For the purposes of such a suit, Congress created the section 505(a) remedy, permitting suit not subject to the normally required minimum jurisdictional amount. *See* W. Rodgers, Environmental Law §1.13 (1977) (discussing prototype citizens' suit provisions of Clean Air Act). The section 505(a) remedy, however, is not the exclusive vehicle for enforcement of the FWPCAA by private citizens. A private

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[9] The legislative history reveals numerous examples of this intent of Congress. *E.g.*, S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 145-46 (1972), *reprinted in Legislative History* at 328-29; 118 Cong. Rec. 33752, *reprinted in Legislative History* at 179 (prepared statement of Sen. Muskie) (Oct. 4, 1972); 118 Cong. Rec. 33756, *reprinted in Legislative History* at 249-50 (remarks of Rep. Dingell) (Oct. 4, 1972). Moreover, although the passage of the House version preceded the *Sierra Club* decision, some representatives argued that the private attorney general theory intended to be adopted called for wording of the section identical to that found in the Clean Air Act. H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 407-09, *reprinted in Legislative History* at 876-78 (additional views of Rep. Bella S. Abzug and Rep. Charles B. Rangel) (describing House version as unnecessarily limited); 118 Cong. Rec. 10771-72, *reprinted in Legislative History* at 671-73 (remarks of Rep. McCloskey) (Mar. 29, 1972) (offering amendment similar to that ultimately adopted at Conference); *see* H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 133-34, *reprinted in Legislative History* at 820-21 endorsing private attorneys general concept).

party who is injured by the alleged violation, as these plantiffs allege they were, has an alternate basis for suit under section 505(e), 33 U.S.C. §1365(e), and the general federal question jurisdiction of the Judicial Code. 28 U.S.C. §1331 (1976). Section 505(e) is a savings clause that preserves all rights to enforce the Act or seek relief against the Administrator.[10] Coupled with the general federal question jurisdiction it permits this suit to be brought by the parties.[11] Moreover, unlike the private attorneys general provision of section 505(a), section 505(e) provides an independent remedy for injured parties unburdened by the notice requirements of section 505(b).

All parties and the court below acknowledge that the federal courts differ on the issue of whether section 505(e) authorizes private enforcement of the Act alternate to that authorized in section 505(a). The more persuasively reasoned cases, however, support our conclusion that section 505(e) was intended to preserve the rights of injured parties to sue to enforce the terms of the Act notwithstanding the expansion of remedies to non-injured parties

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[10] Section 505(e) provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

33 U.S.C. §1365(e).

[11] Under the section 505(e) and 28 U.S.C. §1331 analysis, the plaintiffs, of course, remain subject to the jurisdictional amount requirement except with respect to their claim for injunctive relief against federal officers.

contained in section 505(a). They recognized that the effect of section 505(a) is to give the district court jurisdiction over a new class of plaintiffs, while section 505(e) preserves jurisdiction over the pre-existing right of injured parties to sue to enforce the Act.[12] By relying on the Clean Air Act, Congress made clear its intention to involve citizens in the enforcement of the Act.

The Second Circuit, in an opinion written by Judge Adams of this court sitting by designation, relied upon the Act's legislative history to support its conclusion that

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[12] *Natural Resources Defense Council, Inc.* v. *Train,* 510 F.2d 692, 699-700 (D.C. Cir. 1974); *see Natural Resources Defense Council* v. *Callaway,* 524 F.2d 79, 83-84 (2d Cir. 1975) (60-day notice provision is not absolute bar to suit); *Conservation Soc'y of S. Vt., Inc.* v. *Sec'y of Transp.,* 508 F.2d 927, 938 & n.61, 938-39 (2d Cir. 1974) (same; provision intended to create additional remedy), *vacated,* 423 U.S. 809 (1975) (vacated and remanded for consideration of effect of statutory amendments on issue of preparation of environmental impact statement); *Township of Long Beach* v. *City of New York,* 445 F. Supp. 1203, 1208-10 (D.N.J. 1978) (finding jurisdiction under 28 U.S.C. §1331 gives effect to savings clause).

We therefore decline to follow the Seventh Circuit's opinion in *City of Highland Park* v. *Train,* 519 F.2d 681, 690-91 (7th Cir. 1975), on which the district court relied. The *Highland Park* court's strict reading of the 60-day notice requirement of the Clean Air Act's citizens' suit provision does not persuade us with respect to our savings clause analysis. *See id.* at 693 (rejecting Clean Air Act citizens' suit provision's savings clause analysis); *cf. West Penn Power Co.* v. *Train,* 522 F.2d 302, 307 & n.20 (3d Cir. 1975) (district court's literal reading of Clean Air Act's 60-day notice requirement not raised on appeal). We recognize instead the intent of Congress to create a remedy for a new class of plaintiffs while preserving in section505(e)those preexisting rights of injured individuals to enforce the Act.

failure to give notice was not an absolute bar to suit under the FWPCAA.[13] Moreover, prior to the district court's opinion in the instant matter, Chief Judge Clarkson Fisher had adopted the section 505(e) jurisdiction analysis as well. In *Township of Long Beach* v. *City of New York,* 445 F. Supp. 1203 (D.N.J. 1978), Chief Judge Fisher held that plaintiffs who had failed to comply with the section 505(b) notice requirement could sue in district court under section 505(e) and the general federal question jurisdiction, because they were injured parties suing on their own behalf and alleged damage in excess of the normal jurisdictional amount. *Id.* at 1209-10.[14] We must therefore reverse the holding of the district court that it lacked jurisdiction to entertain plaintiffs' claims under the FWPCAA.

We turn now to the issue of whether plaintiffs have a cause of action independent of that created in section 505(a) on which they may bring suit under section 505(e).

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[13] *Conservation Soc'y of S. Vt.* v. *Sec'y. of Transp.,* 508 F.2d 927, 938 & n.62, 938-39 (2d Cir. 1974) (§ 1365(b) absolute bar analysis is "crabbed construction . . . which . . . fails to account for § 1365(e)"), *vacated,* 423 U.S. 809 (1975) (vacated for consideration of statutory issue of preparation of environmental impact statement). The court assumed arguendo that it had section 505(e) jurisdiction but denied relief on the merits. *Id.*

[14] Nor does our affirmance of the *Loveladies* decision bar today's holding. *See Loveladies Property Owners Ass'n* v. *Raab,* 430 F. Supp. 276, 280-81 (D.N.J. 1975), *aff'd mem.,* 457 F.2d 1162 (3d Cir. 1976) (failure to give notice bars suit under §505(a)), *cert. denied,* 432 U.S. 906 (1977). As Chief Judge Fisher noted in *Township of Long Beach,* the section 505(e) argument was not raised in *Loveladies,* and it is questionable whether the plaintiff there had suffered damage in excess of the required $10,000 amount. *See Township of Long Beach* v. *City of New York,* 445 F. Supp. at 1209 n.8.

In *Cort* v. *Ash,* 422 U.S. 66 (1975), the Supreme Court established a four part test for finding an implied private cause of action.[15] Since *Cort,* the Supreme Court has further refined the test to be applied in determining whether a private right of action arises under any given federal statute.[16] In *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979), the Court broadened the *Cort* test and held that Congress' failure expressly to consider private remedies did not preclude a holding that Congress intended to imply one. *Id.* at 694. More recently, in *Touche Ross & Co.* v. *Redington,* —— U.S. ——, No. 78-309 (U.S. June 18, 1979), the Court noted that the *Cort* factors are merely relevant to the inquiry of whether a private remedy is implicit. *Id.* at ——, slip op. at 15. There, the Court stated that in *Cort* v. *Ash,*

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[15] 422 U.S. at 78. The factors referred to in *Cort* are:

> First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with 'the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. (emphasis in original).

[16] *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* —— U.S. ——, No. 77-1645 (U.S. Nov. 13, 1979); *Touche Ross & Co.* v. *Redington,* —— U.S. ——, No. 78-309 (U.S. June 18, 1979); *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979).

> the Court did not decide that each of these factors is entitled to equal weight. *The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.*

Id. (emphasis added). Thus, the Court noted, the *Cort* factors are simply designed to guide the courts in determining legislative intent. Finally, this Term in *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* —— U.S. ——, No. 77-1645 (U.S. Nov. 13, 1979), the Court applied the *Touche Ross* test, noting that the issue of "whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." *Id.* at ——, slip op. at 4. It held that once legislative intent is discovered, countervailing considertion arising from strict application of the *Cort* factors become irrelevant. *Id.* at ——, slip op. at 11-12. Bearing in mind that the single relevant inquiry is the intent of Congress, we turn to the *Cort* v. *Ash* factors to guide our analysis of the legislative intent.

Applying these factors to the instant case, we hold that a private cause of action is available to these plaintiffs under the FWPCAA.[17] First, we have already held that one of the purposes behind the passage of the FWPCAA was the protection of individuals from injury caused by

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[17] We have already held that the district court had jurisdiction to entertain plaintiffs' suit pursuant to section 505(e) of the Act, 33 U.S.C. §1365(e), and the general federal question jurisdiction, 28 U.S.C. §1331. Separate analysis of jurisdiction and the merits of the cause of action is required by cases such as *Bell* v. *Hood,* 327 U.S. 678 (1946), and *Bivens* v. *Six Unknown Named Agents of the Fed. Bur. of Narcotics,* 403 U.S. 388 (1971).

the polluting activities of others. Thus, although the Act specifically grants a remedy to non-injured persons suing on behalf of the public, it is clear that the "class for whose *especial* benefit the statute was enacted" must have been individuals likely to suffer actual injury by the pollution.[18] Jurisdiction over suits by them is preserved by the savings clause. Although section 505(a) of the Act permits suit by private attorneys general who have suffered no direct economic harm, the statute clearly was intended to protect this particular class of actually injured persons as well. Plaintiffs are members of a class that takes its living from the sea and that is especially hurt by pollution. The general purpose clause of the Act includes a statement that the national goal shall be the attainment of that "water quality which provides for the protection and progagation of the fish, shellfish, and wildlife." 33 U.S.C. §1251(a)(2). Although such protection will of course benefit the public at large, the general purpose clause supports our conclusion that the statute was intended to benefit the class of which plaintiffs are a part, and that a private remedy was intended to be created in their behalf.

As to the second factor in the *Cort* analysis, nothing in the legislative history suggests that the section 505(a) remedy created on behalf of private attorneys general was intended to be exclusive. Indeed, the savings clause broadly preserves all rights to sue "under any statute," language which given the legislative history of the section supports the existence of alternate remedies under

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[18] In *Cannon,* the Court looked to the language of the statute to identify the class intended to be benefitted by the legislation, contrasting such a statute with those intended to benefit the public at large. *Cannon* v. *Univ. of Chicago,* 441 U.S. 677, 690 (1979).

the Act.[19] We reject the argument that the legislative history precludes finding an implied private right of action under the FWPCAA. The Report that accompanied the Senate's original version of the bill noted that the savings clause preserved the rights to sue "under any other law." S. Rep. No. 92-414 at 81, *Legislative History* at 1499.[20] We are not persuaded that this paraphrase of the wording of the Act was intended to preclude the finding of a private remedy under the Act. The wording of the savings clause itself makes clear Congress' intent to preserve the rights of individuals to sue under *any* statute or the common law.

The third *Cort* factor was expanded by the Supreme Court last Term in *Cannon*. There the Court noted that

> when [a private right of action] remedy is necessary or at least helpful to the accomplishment of the purpose the court is decidedly receptive to its implication under the statute.

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[19] We are not persuaded that exclusivity of the section 505(a) remedy is supported by the Senate's rejection of a class action mechanism. S. Rep. No. 92-414 at 81, *Legislative History* at 1499 (§505 does not authorize class actions; intended to avoid Fed. R. Civ. P. 23 problems); *see City of Evansville* v. *Ky. Liquid Recycling*, 604 F.2d 1008, 1014 (7th Cir. 1979) (§505 does not authorize class action or suit for damages).

[20] The Seventh Circuit, addressing the issue of whether there was an implied private cause of action for damages under the FWPCAA, was persuaded that the Senate Report evidenced Congress' intent that no remedy other than that provided for in section 505(a) be implied from the FWPCAA. *City of Evansville* v. *Ky. Liq. Recycling, Inc.*, 604 F.2d 1008, 1018-19 (7th Cir. 1979). We are not persuaded that the language of the Senate Report establishes that the savings clause precludes finding an implied private cause of action under the Act on behalf of these plaintiffs.

441 U.S. at 703. Although not necessary to the accomplishment of the purposes of the FWPCAA, implying a private remedy on behalf of these plaintiffs certainly would be "helpful" to the effectuation of those purposes. Moreover, under the *Cort* analysis, a private remedy would be consistent with the purposes of the Act in general and with the purpose of protecting and encouraging propagation of marine life in particular. *See* 33 U.S.C. §1251(a)(2) (general purpose clause).

Finally, the fourth inquiry in the *Cort* analysis also points to Congress' intent to permit this private cause of action. Far from being an area of traditional state concern, water pollution of the Atlantic Ocean is an interstate phenomenon of federal concern as to which an implied private remedy in the federal courts should not be denied.[21]

Thus, using the *Cort* factors as a guide, we have examined the statute and its legislative history in order to discover the legislative intent. *See Transamerica Mortgage Advisors, Inc.* v. *Lewis,* ——U.S. ——, No. 77-1645, slip op. at 4 (Nov. 13, 1979). We therefore hold that Congress intended to permit the federal courts to entertain a private cause of action implied from the terms of the FWPCAA, preserved by the savings clause of the Act, on behalf of individuals or groups of individuals who

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[21] In *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972), a unanimous Supreme Court recognized that there is a federal common law cause of action to abate pollution of interstate ambient water notwithstanding the relief available under the FWPCAA. *Id.* at 103-05. In Part IV, *infra,* we address this reliance on the federal common law of nuisance in the water pollution context.

have been or will be injured by pollution in violation of its terms.

Having so held, we reject the federal government defendants' sovereign immunity argument. The 1976 amendments to section 1331 of title 28 make clear that sovereign immunity has been waived in all suits by plaintiffs seeking injunctive relief against federal agencies or officers.[22] Whether damages can be recovered from the federal government is a separate question to which the Federal Tort Claims Act speaks. *See* Part VII, *infra*. We must therefore reverse the district court's dismissal of the FWPCAA claims.

II. *The Marine Protection, Research & Santuaries Act*

The Marine Protection, Research & Sanctuaries Act, 33 U.S.C. § 1401-1444 (1976) (MPRSA or Ocean Dumping Act) regulates the transporting and dumping of certain material into the open waters of the ocean. *Id.* § 1401. The Act defines the prohibited material to include dredged material, solid waste, sewage and sewage sludge,[23] and provides for an absolute cessation of dumping of

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[22] *See* Act of October 21, 1976, Pub. L. No. 94-574, *currently codified at* 5 U.S.C. §§702, 703 (1976) and 28 U.S.C. §§1331, 1391 (1976).

[23] 33 U.S.C. §1402(b). The Act also defines "ocean waters" as "those waters of the open seas lying seaward of the base line from which the territorial sea is measured." *Id.* §1402(c). The Act does not apply to outfall structures regulated by the FWPCAA or the Refuse Act. *Id.* §1402(f).

sewage sludge by December 31, 1981.[24] Plaintiffs alleged four separate violations of the MPRSA,[25] all of which were dismissed on the ground that plaintiffs' failure to give notice barred suit in district court.

Like the FWPCAA, the MPRSA provides that citizens' suits may be brought after giving 60 days' notice[26] and contains a savings clause preserving all other rights to

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[24] *Id.* §1412a(a) (1976 & Supp. I). The Act defines sewage sludge to include

> any solid, semisolid, or liquid waste generated by a municipal waste water treatment plant the ocean dumping of which may unreasonably degrade or endanger human health, welfare, amenities, or the marine environment, ecological systems, or economic potentialities.

Id. §1412a(b).

[25] Count I of the Complaint alleged that federal defendants Environmental Protection Agency (EPA) and Army Corps of Engineers (ACE) failed to enforce the provisions of the Act, that the Secretary of the Army and the ACE negligently conducted dredging and dumping operations, and that the state defendants transported and dumped sewage in violation of the Act. Count III alleged that EPA and the Administrator of EPA and ACE and the Secretary of the Army failed to carry out their duties under the Act.

[26] The citizens' suit section of the MPRSA, 33 U.S.C. §1415(g), provides in relevant part that, subject to the notice requirement, *id.* §1415(g)(2), "any person may commence a civil suit on his own behalf to enjoin any person" acting in violation of the terms of the Act. *Id.* Other limitations upon the instituting of citizens' suits are directed toward the avoidance of duplicative litigation and are not relevant to this suit. *See id.* §1415(g)(2).

seek relief.[27] Although the wording of the citizens' suit provision of the MPRSA differs slightly from the FWP CAA provision, the jurisdictional analysis is the same.[28] Thus, because these plaintiffs have not complied with the notice requirement of the citizens' suit provision, their suit under section 1415(g)(1), which governs private attorney general suits by non-injured persons, is barred. However, because they allege that they have suffered direct injury by virtue of the defendants' violations of the Act, jurisdiction over their suit to enforce the provisions of the MPRSA is preserved by the savings clause. Moreover, a private cause of action to enforce the terms of the Act may be implied with respect to these injured plaintiffs. For the purposes of this analysis, the statutory provisions and legislative histories of the MPRSA and FWPCAA are virtually indistinguishable.[29] Thus

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[27] *Id.* §1415(g)(5). The savings clause provides

> (5) The injunctive relief provided by this subsection shall not restrict any rights which any person (or class of persons may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other

Id.

[28] *Compare* 33 U.S.C. §1365(a) (any citizen may sue) *with id.* §1415(g)(2) (any person may sue). The legislative history of the MPRSA is less clear than that of the FWPCAA, although the citizens' suit provision appears to have been patterned on the Clear Air Act formulation, as was the provision found in the FW PCAA.

[29] Indeed, the MPRSA language, if anything, is broader than that of the FWPCAA. *See* Part I *supra* (legislative history and statutory analysis of FWPCAA). Other courts, including the dis-

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we hold that the district court had jurisdiction to entertain this suit by these plaintiffs pursuant to the savings clause of the MPRSA and that a private cause of action to enforce the terms of the Act may be implied on behalf of these injured parties. We must therefore reverse the judgment of the district court dismissing the plaintiffs' MPRSA claims.

III. *The Rivers and Harbors Act (Refuse Act)*

Plaintiffs also allege that federal defendant Army Corps of Engineers (ACE) and the state defendants violated section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1976) (The Refuse Act). The Refuse Act makes it unlawful to discharge or permit to be discharged "any refuse matter of any kind or description whatever other than that flowing from streets and sewers into any navigable water of the United States or any tributary thereof." *Id.* The district court dismissed this part of the complaint. We affirm.

The Rivers and Harbors Act is limited by its terms to enforcement by the United States Attorneys. 33 U.S.C. § 413 (1976). The majority of courts, and the courts of this circuit that have addressed this issue, have held that the Act precludes private suits and have thus refused to

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trict court which ruled on this case do not analyze the MPRSA and FWPCAA separately, holding that the Acts are virtually identical in this regard. *E.g., Township of Long Beach* v. *City of New York*, 445 F. Supp. 1203, 1210-11 (D.N.J. 1978); *Save Our Sound Fisheries Ass'n* v. *Callaway (SOSF II)*, 429 F. Supp. 1136, 1140-42 (D.R.I. 1977).

find an implied private cause of action. *Red Star Towing & Transp. Co.* v. *Dept. of Transp.*, 423 F.2d 104, 105 (3d Cir. 1970) (Act enforced by penal sanctions only); *Township of Long Beach* v. *City of New York*, 445 F Supp. 1203, 1211-12 (D.N.J. 1978) (rejecting private cause of action); *see Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81, 85-87 (2d Cir. 1972) (§ 413 delegates enforcement to Department of Justice; private party may not force prosecution under § 407); *Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275, 1279-80 (D. Conn. 1976) (Act protects public at large rather than private group of individuals), *aff'd mem. sub nom. East End Yacht Club, Inc.* v. *Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977); *Anderson* v. *Norfolk & Western Ry.*, 349 F. Supp. 121, 122 (W.D. Va. 1972) (§ 413 delegates enforcement to United States Attorneys; Act precludes *qui tam* enforcement). We adhere to the view that enforcement of the Refuse Act is limited to action by the United States Attorneys.[30] There-

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[30] We reject the argument that the court should imply a private cause of action in cases in which the United States Attorney is not in a position to enforce the terms of the Act. *See NRDC* v. *Grant*, 355 F. Supp. 280, 290 (E.D.N.C. 1973) (finding private cause of action because U.S. Attorney serving as counsel for defendants). The *NDRC* v. *Grant* decision, finding an implied private cause of action because the United States Attorney was involved as counsel for the federal government defendants, does not persuade us that a private remedy should be implied. That decision was based upon an analogy to two provisions of the Rivers and Harbors Act which have generally been interpreted to permit a private cause of action. *Id.* The argument that the conflicting enforcement and defense roles of the United States Attorney support the implied private remedy has been explicitly rejected by this court. *Red Star*

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fore the dismissal of plaintiffs' refuse Act claims must be affirmed.

IV. *The Federal Common Law of Nuisance*

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), a unanimous Supreme Court recognized that there is a federal common law cause of action to abate polluition of interstate ambient water, notwithstanding any relief available under the FWPCAA[31] and held that such a cause

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Towing & Transp. Co. v. *Dept. of Transp.*, 423 F.2d 104, 105 (3d Cir. 1970); *see Township of Long Beach* v. *City of New York*, 445 F. Supp. 1203, 1211-12 (D.N.J. 1978) (no private remedy even if federal government is defendant; rejecting *Grant* analysis); *Loveladies Property Owners Ass'n* v. *Raab*, 430 F. Supp. 276, 281 (D.N.J. 1975) (no implied private remedy under §407; relying on *Red Star Towing*), *aff'd mem.* 547 F.2d 1162 (3d Cir. 1976), *cert. denied*, 432 U.S. 906 (1977).

[31] 406 U.S. at 103-05. The court held that the relief available under the FWPCAA is not an exclusive remedy. *Id.* at 104. In the private enforcement context, this holding probably is statutorily compelled. The FWPCAA provides for injunctive relief and the assessment of civil penalties, but does not create a cause of action for damages. The savings clause of the citizens' suit provision, which preserves all rights of litigants to sue under any statute or common law, has the effect of preserving these plaintiffs' rights to sue for damages under the remedy created in *Illinois* v. *City of Milwaukee*. *See* 33 U.S.C. §1365(e).

Since *Illinois* v. *City of Milwaukee* was decided, the FWPCAA has been amended twice, but these amendments do not suggest that Congress intended to preempt the federal nuisance remedy. The Seventh Circuit, in deciding an appeal from the remand of

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of action presented a federal question over which the district courts had section 1331 jurisdiction.[32] The district court refused to extend the cause of action to private litigants and dismissed plaintiffs' common law nuisance claim. In so holding, the court relied on holdings by other federal district courts that only governmental agencies can sue for relief from a public nuisance.[33] We hold that

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the *Illinois* case, analyzed the amended act to permit a claim for nuisance independent of the FWPCAA remedies. *Illinois* v. *City of Milwaukee,* 599 F.2d 151, 162 (7th Cir. 1979) (Act "suggests, if it does not require, the conclusion that Congress did not intend to preempt the federal common law of nuisance"), *petition for cert. filed,* 48 U.S.L.W. 3155 (U.S. Sep. 11, 1979) (No. 79-408); *see* 33 U.S.C. §1370 (state authority to enforce more stringent limitations); *id.* §1371 (chapter shall not be construed to limit or impair authority of officers or agencies). Moreover, the Seventh Circuit relied upon the explicit language of the savings clause in reaching that conclusion. That clause preserves all remedies under "any statute or common law." 33 U.S.C. §1365(e); *see* S. Rep. No. 93-414 at 81 *reprinted in Legislative History* at 1499 ("Compliance with [the] . . . Act would not be a defense to a common law nuisance action for damages."). There is no suggestion that "common law" was intended to be limited to state rather than federal common law. We thus agree that the amended Act does not preclude an independent nuisance remedy.

[32] 406 U.S. at 105; 28 U.S.C. §1331 (1976); *see Illinois* v. *City of Milwaukee,* 599 F.2d 151, 162-63 (7th Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3155 (U.S. Sep. 11, 1979) (No. 79-408).

[33] *See Parsell* v. *Shell Oil Co.,* 421 F. Supp. 1275, 1281 (D. Conn. 1976), *aff'd mem. sub nom., East End Yacht Club Inc.* v. *Shell Oil Co.,* 573 F.2d 1289 (2d Cir. 1977); *Committee for Consid. of Jones Falls Sew. Sys.* v. *Train,* 375 F. Supp. 1148 (D. Md. 1974), *aff'd on different but not inconsistent grounds,* 539 F.2d 1006 (4th Cir. 1976).

the common law nuisance remedy recognized in *Illinois* v. *City of Milwaukee* is available in suits by private parties.

The Court stated explicitly in *Illinois* that although both parties to that suit were governmental, "it is not only the character of the parties that requires us to apply federal law." *Illinois* v. *City of Milwaukee,* 406 U.S. at 105 n.6. Rather, the Court noted that "where there is an overriding federal interest in the need for a uniform rule of decision . . . we have fashioned federal common law." *Id.* In the instant case, plaintiffs are suing for damages to interstate ambient water, an issue as to which there is a clear and overriding federal interest in uniformity.[34] There is no question but that the interstate pollution here alleged is a problem calling for the application of a uniform federal standard. Relegating these litigants to possibly conflicting New York and New Jersey nuisance standards would ignore the clear intent of the Supreme Court to federalize those standards and would undermine that federal uniformity. These plaintiffs have sufficiently alleged pollution of interstate waters.[35] In order to give

[34] In reaching the conclusion that federal common law may be fashioned to deal with federal rights, and that ambient air or water are interstate problems as to which there is a federal common law remedy, the Supreme Court relied upon *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 457 (1957) and *Texas* v. *Pankey,* 441 F.2d 236, 240-41 (10th Cir. 1971). *Illinois* v. *City of Milwaukee,* 406 U.S. at 103 & n.5.

[35] Failure sufficiently to allege interstate effects has proved fatal to plaintiffs seeking to base their suits on the federal common law nuisance remedy. *Reserve Mining Co.* v. *EPA,* 514 F.2d 492, 520 (8th Cir. 1975); *Committee for Consid. of Jones Falls Sew.*

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full effect to the federal common law of nuisance recognized in *Illinois*, private parties should be permitted, and indeed encouraged, to participate in the abatement of such nuisances. Courts have already extended the *Illinois* remedy to the federal government[36] and to municipalities,[37] and one district court has applied it on behalf of private litigants.[38] The effectuation of the purposes of the *Illi-*

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Sys. v. *Train*, 539 F.2d 1006, 1009 (4th Cir. 1976). In *Illinois* v. *City of Milwaukee*, the immediate issue of concern was the need to apply uniform federal law where the polluting activities of one state caused harm to another state. The need for uniformity, however, is no less a concern where individuals are harmed by the polluting activities of states or their subdivisions. To hold that plaintiffs may not avail themselves of this remedy is to leave open the possibility that this pollution will continue unabated and that the damages suffered by these individuals will be unremedied. Such result was surely not intended by the unanimous Court in *Illinois* v. *City of Milwaukee*.

[36] *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *United States* v. *Ira S. Bushey & Sons*, 346 F. Supp. 145, 149-50 (D. Vt. 1972), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

[37] *City of Evansville* v. *Ky. Liq. Recycling, Inc.*, 604 F.2d 1008, 1018-19 (7th Cir. 1979).

[38] In *Byram River* v. *Village of Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975), the court extended the *Illinois* v. *City of Milwaukee* remedy to (1) Byram River, (2) a private corporation, Byram River Pollution Abatement Association, (3) the Town of Greenwich, a municipal corporation, and (4) a private individual owning land on the river's bank. *Id.* at 622 (relying on *Illinois* v. *City of Milwaukee* and 28 U.S.C. §1331).

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nois v. *City of Milwaukee* remedy and the fulfillment of the Supreme Court's intent in creating that remedy lead us to conclude that it is available to these private litigants who have been injured by the effects of the polluting activities of these defendants. While *Illinois* v. *City of Milwaukee* did not address this specific issue, we are convinced that the Court would apply the mode of analysis of *Lincoln Mills*[39] and would look to the Restatement formulation as an appropriate source for a federal rule. These plaintiffs have alleged sufficient individual damage to permit them to recover damages for this essentially

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In *Stream Pollution Control Board* v. *United States Steel Corp.*, 512 F.2d 1036 (7th Cir. 1975), the Seventh Circuit held that common law relief is available to a pollution control board, but denied the motion of a private individual to intervene on the ground that the federal common law nuisance suit was not a suit commenced to enforce compliance with an FWPCAA "standard, limitation or order." *Id.* at 1039-41, 1040 n.9; *see* 33 U.S.C. §1365(b)(1)(B) (governing intervention). The court did not address the availability of the *Illinois* remedy to a private individual, but held that the remedy extended to the pollution control board because the "complaint raises substantial questions which only a federal court may finally answer." 512 F.2d at 1040. Although the Seventh Circuit has since questioned the analysis of the FWPCAA permit system in *Stream Pollution, see United States Steel Corp.* v. *Train*, 356 F.2d 822, 830 n.3 (7th Cir. 1977), that affects only the issue of whether under the Act, the private individual could intervene. In *Potomac River Association* v. *Lundeberg Md. Seamanship School*, 402 F. Supp. 344 (D. Md. 1975), the court permitted private plaintiffs to sue for the maritime tort of nuisance without reference to a federal common law nuisance claim. *Id.* at 358-59; *see* Part V, *infra.*

[39] *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957).

public nuisance. The Restatement (Second) of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (1979). A private party may recover damages for a public nuisance if, while exercising the common right, he has suffered damages different in kind from those suffered by the public. *Id.* § 821C. The Restatement for formulation encompasses the injury alleged in this case.[40] In *Burges* v. M/V TAMANO, 370 F. Supp. 247 (D. Me. 1973), the court held that

> it would be incongrous to say that a man engaged in commercial fishing or clamming, and dependent thereon for his livelihood, who may have had his business destroyed by the tortious acts of another should be denied any right to recover for his pecuniary loss on the ground that his injury is no different in kind from that sustained by the general public.

Id. at 250. Thus, these plaintiffs, who have a right under federal common law to abate the pollution of interstate waters, have also suffered sufficient individual harm to sue for damages arising from that public nuisance. We therefore hold that the federal common law of nuisance may be enforced by private plaintiffs and that these plain-

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[40] Illustration 11, explicitly included within the different in kind test, is indistinguishable from the facts of this suit. It states:

> 11. A pollutes public waters, killing all of the fish. B. who has been operating a commercial fishery in these waters, suffers pecuniary loss as a result. B can recover for the public nuisance.

Restatement (Second) of Torts §821C, Illustration 11 (1979).

tiffs have sufficiently alleged individual harm to permit recovery of damages for the public nuisance. Thus we must reverse the trial court's dismissal of the plaintiffs' federal common law nuisance claim.

V. *Admiralty Jurisdiction and Maritime Torts*

Plaintiffs also listed the federal admiralty law as an alternate basis for their tort claims. *See* U.S. Const. art III, §2; 28 U.S.C. §1333 (1976); 46 U.S.C. §740 (1976). The Supreme Court's traditional test for the existence of admiralty jurisdiction is two-fold; first, the traditional element of a maritime locality must be established; and second, a signifıcant relationship to a traditional maritime activity must be proven. *Executive Jet Aviation, Inc.* v. *Cleveland,* 409 U.S. 249 (1972). The situs test may be no longer signfıcant. *See P.C. Pfeiffer Co.* v. *Ford,* —— U.S. ——, 48 U.S.L.W. 4018, 4019 (U.S. Nov. 27, 1979); *Sea-Land Serv.* v. *Director, Office of Workers' Compens.,* 540 F.2d 629, 635-39 (3d Cir. 1976). That need not concern us here for both elements are satisfied by the allegations of the complaint. The situs of the algal bloom was the high seas. The nexus to maritime commerce is plain. *See, e.g., Moore* v. *Hampton Roads Sanitation Dist. Comm'n,* 557 F.2d 1030, 1034 (4th Cir. 1976) (harvesting oysters and clams, like fishing, is traditional maritime activity meeting nexus test of *Executive Jet*), *cert. denied,* 434 U.S. 1012 (1978); *Union Oil Co.* v. *Oppen,* 501 F.2d 558, 561 (9th Cir. 1974) (fishing industry is part of maritime activity); *Potomac River Ass'n* v. *Lundeberg Md. Seamanship School,* 402 F. Supp. 344, 358 (D. Md. 1975) (injury to commercial fishing meets tests of *Executive Jet*). Thus, this suit by plaintiffs for the tort nuisance

committed in the navigable waters and injuring those engaged in maritime commerce falls within the admiralty jurisdiction of the district court.[41]

Having held that the district court had jurisdiction in admiralty over plaintiffs' claims, we turn to whether plaintiffs have sufficiently alleged a cause of action sounding in maritime tort. One district court has recognized that a suit by clammers and fishermen for damages caused by an oil spill sounded in maritime tort and that recovery could be had for damages suffered by private plaintiffs alleging tortious invasions different from those suffered by the general public. *Burgess* v. M/V TAMANO, 370 F. Supp. 247, 249-50 (D. Me. 1973). The court held that the pollution was an interference with plaintiffs' direct exercise of a public right to fish and dig for claims and thus caused them damages different in kind from those suffered by the general public. *Id.* at 250.

The district court dismissed this claim on the ground that plaintiffs' Complaint was insufficient to allege a cause of action sounding in maritime tort. To the extent that plaintiffs have attempted to allege a mariitme tort, it must be found in Count I of their Complaint. That Count seeks recovery based on a theory of federal common law nuis-

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[41] We need not consider plaintiffs' assertion that the court had jurisdiction independently under the Extension of Admiralty Act, 46 U.S.C. §740 (1976). That Act was intended to broaden jurisdiction to cases over which jurisdiction would not have existed under the strict locality test employed prior to *Executive Jet*. The Act extends admiralty jurisdiction to injuries caused by a vessel on navigable waters the effects of which are felt on land.

ance, rather than alleging specifically a maritime tort.[42] But the facts which support a *Burgess*-type admiralty tort claim are sufficiently alleged, and thus judged by the standards applicable to motions under Fed. R. Civ. P. 12(b)(6) the Complaint is sufficient. Probably the substantive legal standards applicable to the maritime nuisance tort and the federal common law nuisance tort recognized in *Illinois* v. *City of Milwaukee* are the same, although on this record we need not fully explore that question. Nor need we decide whether the plaintiffs must at some point elect between admiralty and non-admiralty remedies. Finally, the district court did not, and thus we do not reach the question of whether the Limitation of Liability Act, 46 U.S.C. §§181-195 (1976), would be available to limit liability of the federal and municipal government defendants for damages to the value of the vessels used to barge the sewage and dredge spoils to the various dumping sites. We do hold that it was error to dismiss plaintiffs' maritime tort claims against all defendants at the pleading stage.

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[42] The confusion arises because the nuisance claim also requires a showing that these private individuals have suffered damages different in kind from those suffered by the general public. *See* Part IV, *supra*. In *Burgess*, the court held that the tort of nuisance could be a maritime tort and analyzed the Complaint under an admiralty theory. *See* 370 F. Supp. at 250. The plaintiffs in *Burgess* did not raise, and the court did not address, the federal common law nuisance issue. Thus, the *Burgess* opinion does not persuade us that an allegation of the tort of nuisance as to which recovery is expressly based on the doctrine of federal common law nuisance may not also be liberally read as sounding in maritime tort.

VII. *Federal Tort Claims Act*

The district court held that the cause of action against federal agencies based on maritime tort was barred by plaintiffs' failure to comply with the requirements of the Federal Tort Claims Act, 28 U.S.C. §§2671-2680 (1976) (FTCA).[43] The terms of the FTCA define the limits of the Court's jurisdiction to hear suits brought pursuant to the Act. *United States* v. *Sherwood,* 312 U.S. 584, 586 (1941); *Rosario* v. *American Export Isbrandsten Lines,* 531 F.2d 1227, 1231 (3d Cir.), *cert. denied,* 429 U.S. 857 (1976). Under the Act, claims must first be presented to the appropriate federal agency and no suit may be filed until six months thereafter. 28 U.S.C. §2675. Regulations promulgated pursuant to the Act require that each claim so presented contain a demand for a sum certain. 28 C.F.R. §14.2 (1978). These requirements were intended to create a system of prelitigation administrative consideration in order to settle claims and avoid unnecessary litigation.[44] Plaintiffs failed to observe the six months' waiting period. The district court held and we agree that it did not have jurisdiction to entertain the plaintiffs'

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[43] *See* 28 U.S.C. §2675 (six months must elapse following presentation of claim to federal agency before suit may be filed); 28 C.F.R. §14.2 (1978) (claim must demand sum certain in damages).

[44] *Bialowas* v. *United States,* 443 F.2d 1047, 1049-50 (3d Cir. 1971); *see Pennsylvania* v. *Nat'l Ass'n of Flood Insurers,* 520 F.2d 11, 19 (3d Cir. 1975) (sum certain requirement); *Ryan* v. *United States,* 457 F. Supp. 400, 402 (W.D. Pa. 1978) (same).

claims under the FTCA.[45] This precludes a money damage recovery against federal agencies based on state law. Since we are remanding the federal common law nuisance claim we leave open the question, not addressed by the parties to this appeal, whether absent a reference in some statute waiving sovereign immunity for federal common law torts, monetary relief against the federal defendants is unavailable.

VIII. *The National Environmental Policy Act (NEPA)*

The plaintiffs allege that the Environmental Protection Agency has violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1976 & Supp. I), by failing to develop, plan, and coordinate federal functions, programs, and resources to the end that the Atlantic Ocean might exist without degradation, and that those who use the marine environment would be protected from risk to health or safety or other undesirable consequences. The district court held that the complaint failed to state a cause of action under NEPA. The issue is one of considerable complexity. The preparation of an environmental impact statement is required for every "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1976). The Administrator of the Environmental Protection Agency, however, is statutorily exempt from the environ-

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[45] We express no view as to whether the sum requested by plaintiffs was sufficiently certain, *see Fallon* v. *United States*, 405 F. Supp. 1320, 1322 (D. Mont. 1976), or whether plaintiffs' claims against federal agencies and officials for negligent enforcement of various federal acts would be barred by the FTCA's exception for discretionary functions. *See* 28 U.S.C. §2680(a) (1976).

mental impact statement requirement. 33 U.S.C. § 1371 (c)(1) (1976). Whether other substantive provisions of NEPA would afford relief is not entirely clear.[46] Further complicating the application of NEPA is the fact that some actions of the Agency are discretionary, 42 U.S.C. § 4331, and are reviewable only pursuant to the Administrative Proceduce Act, 5 U.S.C. § 706 (1976). *See Environmental Def. Fund* v. *Corps of Eng.*, 470 F.2d 289, 298 n. 14, 298-300 (8th Cir. 1972), *cert. denied,* 412 U.S. 931 (1973). Because it does not appear at this stage of the case that a cause of action based upon NEPA would afford to the plaintiffs and the class they seek to represent any relief different from or more extensive than the relief which would be available under the claims we have already discussed, we decline at this time to pass upon the merit of the rather complex issues posed by NEPA. The district court will be free to reconsider the NEPA contentions in the light of the record developed on remand.

IX. *State Tort Claims Acts*

Moreover, to the extent that plaintiffs also failed to comply with the requirements of the New Jersey[47] and

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[46] Courts differ, for example, on the question of whether section 101 of NEPA, setting forth Congress' declaration of purpose, would afford such relief. *Compare Calvert Cliffs' Coord. Comm.* v. *AEC*, 449 F.2d 1109, 114 (D.C. Cir. 1971) (§101 of NEPA is substantive) *with Shifflin* v. *Schlesinger,* 548 F.2d 96, 100-01 (3d Cir. 1977) (§101 lacks independent substantive impact).

[47] New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 12-2 (1972). The statute provides that public entities may only be sued if a claim is presented within 90 days after the cause of action accrues and no court suit may be instituted prior to six months thereafter. *Id.* 59:8-8. The trial judge has discretion under the statute to expand the filing time from 90 days to one year if no substantive prejudice results. *Id.* 59:8-9.

New York[48] tort claims acts, the dismissal of their claims under those acts must be affirmed. We do so, however, without prejudice to present compliance with the requirements of those statutes and suit thereunder in the future.[49]

X. *Constitutional Claims*

Plaintiffs also alleged violation of their fifth, ninth, and fourteenth amendment rights. They argued that there is a constitutional right to a pollution-free environment and that, by virtue of their special relationship to the environment, they can enforce this right. The district court rejected the constitutional argument and we affirm that holding. It is established in this circuit and elsewhere that there is no constitutional right to a pollution-free environment. *See, e.g., Township of Long Beach* v. *City of New York,* 445 F. Supp. 1203, 1212-13 (D.N.J. 1978) (citing cases rejecting constitutional analysis). We hold that the district court properly rejected the plaintiff's constitutional claims.

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[48] N.Y. General Municipal Law (McKinney) §50-e (1977). The statute provides that notice of a claim must be filed within 90 days after the cause of action accrues, *id.*, that suit may not be filed until 30 days have elapsed after the filing of the notice, *id.* §50-i(1), and that no suit may be brought more than one year and 90 days after the accrual of the cause of action. *Id.* §50-i(1)(c). A suit within the admiralty jurisdiction, however, is not subject to the requirements of the New York Tort Claims Act. *Rogers* v. *City of New York,* 259 N.Y.S.2d 604, 608-09 (N.Y. Sup. Ct. 1965).

[49] Plaintiffs' failure to comply with the requirements of the state tort claims statutes, however, only bars suit under those statutes. It does not preclude suit if an alternative basis for suit against the defendants is pleaded. The state tort claims acts may not preempt federal statutory or common law causes of action.

XI. *Other Contentions*

Defendants Passaic Valley Sewerage Commission (PVSC), Linden Roselle Sewerage Authority, and Middlesex County Sewerage Authority as separate grounds for affirmance plead that suits against them must be dismissed on eleventh amendment grounds. We reject that contention. These defendants are municipal corporations as to whom sovereign immunity under the eleventh amendment does not apply. *See* N.J.S.A. 40:14B-4 (1957); N.J.S.A. 58:14-2 (1957).

XII. *Conclusion*

The judgment dismissing the Complaint will be reversed to the extent that it dismissed plaintiffs' claims under the Federal Water Pollution Control Act, the Marine Protection, Research and Sanctuaries Act, their common law nuisance claims and their maritime tort claims. The district court's dismissal of the Refuse Act claim, the Federal Tort Claims Act and the state tort claims act claims, and the constitutional claims will be affirmed. The district court's dismissal of the National Environmental Policy Act claim will be vacated and that claim remanded for consideration of the record developed on remand. The case will be remanded to the district court for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Judgment of the Court of Appeals

(Filed—February 5, 1980)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1360

NATIONAL SEA CLAMMERS ASSOCIATION and GOSTA LOVGREN,

Appellants,

v.

CITY OF NEW YORK, HONORABLE ABRAHAM BEAME, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN, individually and as ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, MARTIN R. HOFFMANN, individually and as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, OGDEN R. REID, individually and as COMMISSIONER OF THE NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW JERSEY DEPARTMENT OF

ENVIRONMENTAL PROTECTION, DAVID J. BARDIN, individually and as COMMISSIONER OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, BERGEN COUNTY SEWER AUTHORITY, THE JOINT MEETING OF ESSEX AND UNION COUNTIES, PASSAIC VALLEY SEWERAGE COMMISSIONERS, MIDDLESEX COUNTY SEWERAGE AUTHORITY, THE LINDEN ROSELLE SEWERAGE AUTHORITY, MIDDLETOWN SEWERAGE AUTHORITY, WEST LONG BEACH SEWER DISTRICT, COUNTY OF WESTCHESTER, DEPT. OF ENVIRONMENTAL FAC., CITY OF LONG BEACH AND CITY OF GLEN COVE.

(D.C. Civil No. 77-0126)

On Appeal from the United States District Court for the District of New Jersey

Present: Gibbons and Higginbotham, *Circuit Judges* and Weiner, *District Judge**

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on October 16, 1979.

On consideration whereof, it is now here ordered and

* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

adjudged by this Court that the judgment of the said District Court filed January 9, 1979, be, and the same is hereby affirmed as to that portion of the said judgment dismissing the Refuse Act claim, the Federal Tort claims Act and state tort claims act claims, and the constitutional claims; that part of the judgment dismissing the complaint is reversed to the extent that it dismissed plaintiffs' claims under the Federal Water Pollution Control Act, the Marine Protection, Research and Sanctuaries Act, their common law nuisance claims and their maritime tort claims; that portion of the judgment dismissing the National Environmental Policy Act claim is vacated and that claim is remanded for consideration of the record developed on remand. It is further ordered that the cause is hereby remanded to the district court for further proceedings, consistent with the opinion of this Court.

ATTEST:

THOMAS F. QUINN
Clerk

February 5, 1980

Certified as a true copy and issued in lieu
of a formal mandate on March 21, 1980.

Test: M. (Illegible)
Chief Deputy Clerk,
United States Court of Appeals
for the Third Circuit

Opinion of the District Court

(Filed—August 14, 1978)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL ACTION No. 77-126

NATIONAL SEA CLAMMERS ASSOCIATION, etc., *et al.*,

Plaintiffs,

v.

CITY OF NEW YORK, etc., *et al.*,

Defendants.

MEANOR, District Judge.

This matter comes before the court on motions by 14 defendants to dismiss the complaint for lack of jurisdiction and/or failure to state a claim upon which relief may be granted. Because the parties rely on material outside the pleadings, these motions will be treated as ones for summary judgment.

Plaintiffs are the National Sea Clammers Association (NSCA), an incorporated association with its principal place of business in Absecon, New Jersey, and Gosta Lovgren, a member of NSCA and a New Jersey resident. They have brought this class action on behalf of those who

harvest the waters and sea beds of the Atlantic Ocean for a living against 16 governmental agency and individual defendants. Said defendants are municipal, county or federal governmental bodies, and employees thereof, charged with responsibility for sewage disposal and dredging operations on or about the New York-New Jersey seacoast. They may be classified as New York, New Jersey or federal. The New York defendants are: City of New York; Abraham Beame, Mayor of the City of New York;[1] West Long Branch Sewer District;[2] County of Westchester;[3] City of Long Beach and City of Glen Cove. The New Jersey defendants are: Bergen County Sewer Authority; The Joint Meeting of Essex and Union Counties; Passaic Valley Sewerage Commissioners; Middlesex County Sewerage Authority; Linden-Roselle Sewerage Authority; and Middletown Sewerage Authority. The federal defendants are the United States Environmental Protection Agency (USEPA); Russell E. Train, individually and as Administrator of USEPA: the United States Army Corps of Engineers (USACE); and Martin R. Hoffman, individually and as Secretary of the United States Department of the Army.

Plaintiffs allege that the defendants, by commission or omission, have caused or permitted the pollution of the

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[1] Since the filing of this complaint, Edward Koch has replaced Mr. Beame as Mayor of New York City.

[2] The West Long Beach Sewer District has never been served with summons and complaint in this action.

[3] The County of Westchester was apparently served with summons and complaint on January 26, 1977, but it has yet to file an answer.

Atlantic Ocean by sewage and other wastes and debris, which pollution has directly or indirectly resulted in damage to the marine environment and destruction of ocean life and the clamming industry. The only damage precisely described in terms of location and date is the allegation that defendants' polluting activities resulted in a massive growth of algae covering the Atlantic Ocean from a few to 20 miles offshore over an area from southwest Long Island, New York to due east of Cape May, New Jersey. This algal bloom is alleged to have occurred in the summer of 1976.

Plaintiffs predicate their 11 count complaint[4] on a myriad of federal and state grounds: The Federal Water Pollution Control Act Amendments of 1972 (FWPCAA), 33 U.S.C. § 1251 *et seq.* (Supp. 1977); The Marine Protection, Research, and Sanctuaries Act of 1972 (Ocean Dumping Act or MPRSA), 33 U.S.C. § 1401 *et seq.* (Supp. 1977); The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.* (1977); Section 13 of the Rivers and Harbors Act of 1899 (Refuse Act), 33 U.S.C. § 407 (1970); article VI, clause 2 of the Constitution of the United States and the fifth, ninth and fourteenth amendments; the Civil Rights Act, 42 U.S.C. § 1983 (1974); the Extension of Admiralty and Maritime Juris-

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[4] As originally filed, the complaint contained 13 counts against 20 defendants. On April 26, 1977, the complaint was dismissed as to four New York and New Jersey state defendants: The New York Department of Environmental Conservation (NYDEC); Ogden R. Reid, individually and as Commissioner of NYDEC; the New Jersey Department of Environmental Protection (NJ DEP); and David J. Bardin, individually and as Commissioner of NJDEP. At that time, counts V and VI, which pertain only to the dismissed defendants, were dismissed.

dictional Act, 46 U.S.C. § 740 (1975); the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976) and 28 U.S.C. § 2671 *et seq.* (1965); The Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* (1977); federal common law nuisance; New York Environmental Conservation Law, N.Y.Environ.Conserv. § 1-0101 *et seq.* (McKinney 1973); New Jersey Conservation and Development Law, N.J.S.A. 13:10-1 *et seq.* (1968); and state common law trespass and nuisance. Plaintiff allege jurisdiction under 28 U.S.C. §§ 1331 (1966), 1333 (1966); 1343 (1976); 1346 (b) (1976), 1337 (1976) and 1361 (1976).[5] Plainitffs seek $250 million in compensatory damages, $250 million in punitive damages, fines, an injunction and other relief.

The instant action was filed on January 14, 1977. With the exception of the federal defendants and West Long Beach Sewer District, service was effected on the defendants between January 25, 1977 and February 1, 1977. While the summons and complaint were served on USACE, Hoffman, USEPA and Train on January 27, 1977, service against the four federal defendants was not perfected pursuant to F.R.Civ.P. 4(d)(4) (Supp. 1977) until December 2, 1977 with the service of the Attorney General of the United States and the U.S. Attorney for the District

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[5] Plaintiffs have also attempted to predicate jurisdiction on two clearly inappropriate bases, to wit, 28 U.S.C. § 1332 (diversity) and the APA, 5 U.S.C. § 701 *et seq.* Because plaintiffs and several defendants are residents of New Jersey, plaintiffs have failed to show the complete diversity required for jurisdiction under 28 U.S.C. § 1332. *Strawbridge* v. *Curtis*, 7 U.S. (3 Cranch) 267 (1806); *Quaker State Dyeing & Finishing Co.* v. *Cally*, 528 F.2d 470, 473 (3d Cir. 1975). The APA does not provide an independent jurisdictional base for a suit challenging governmental action. *Califano* v. *Sanders*, 430 U.S. 99 (1977).

of New Jersey. West Long Beach Sewer District was never served. A number of the defendants have filed crossclaims against the other defendants alleging that the crossclaimants have complied with applicable federal and state permits and, therefore, any liability on their part is attributable to the conduct of others.

Some of the defendants received, in addition to the complaint, special notice of plaintiffs' claims. Said notice was in the form of a letter[6] from Edward German, on

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[6] The letter was essentially a form letter with appropriate modifications for each addressee. The following is the text of the letter sent to the City of New York:

> PLEASE TAKE NOTICE, that I, Edward C. German, on behalf of the National Sea Clammers' Association and the class of claimants representing clamdiggers, lobstermen, and fishermen, hereby claim damages in excess of the sum of $250 million, against the City of New York, for injuries and damages to, and the destruction of the property specified in the statement below, and unless such claim is adjusted and paid within the time specified by law, I shall commence an action against said City of New York, to enjoin the complained of conduct, to require the City to take corrective action and to recover damages in excess of $250 million and please take further notice
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> THAT said property has been damaged day by day since approximately on or before September of 1976 in the Atlantic Ocean in an area ranging from approximately the southwest portion of Long Island, New York, to a point approximately due east of Cape May, New Jersey, and extending from a few miles off shore to more than twenty (20) miles out to sea and further
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> THAT said damage has been inflicted upon claimants' clam beds, lobster beds, and fishing grounds when such clam beds,

(Footnote continued on following page)

behalf of NSCA, claiming damages caused by pollution to marine environment and life of the Atlantic in an amount "in excess of 250 million dollars." The letter stated further that the property damaged, the value thereof and the cost of repair "cannot be specifically itemized and estimated at this time." This letter was served on the City of New York on November 29, 1976, on Train, Hoffman and USACE on January 3, 1977, and on the cities of Glen Cove and Long Beach on March 25, 1977. The record contains conflicting sworn statements as to whether plaintiffs served the Middlesex County Sewerage Authority with letter notice. Plaintiffs claim to have made service on March 25, 1977, but Middlesex denies receipt.

In addition, on or about March 22, 1977 USEPA was served with a formal claim filed pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* The amount of the claim was stated to be "in excess of $250,000,000."

The rest of the defendants received no notice of the plaintiffs' claims other than the complaint itself.

With the exception of West Long Beach Sewer District and the County of Westchester, all the defendants

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lobster beds, and fishing grounds were destroyed by and through the sewage systems owned, operated, and controlled by the City of New York, by which sludge and sewage effluent was dumped directly by ship into the ocean and by which sewage effluent was carried into the ocean by outfall pipes maintained by the City of New York and further

THAT a statement in detail of the property damaged and/or destroyed and the value thereof, as well as the specific cost of repair to claimants' damage property cannot be specifically itemized and estimated at this time.

have joined in the instant motions for summary judgment on the complaint. Because of the number and variety of the movants and the number of issues raised, I shall consider the contentions of the parties essentially on a count-by-count basis.

Discussion

I

Count I charges that the New York and New Jersey defendants have released sewage effluent and dumped dredgings and toxic materials into the Atlantic with the approval and direction of the federal defendants. These polluting activities are claimed to have fed an algal bloom in the Atlantic during the summer of 1976, destroyed marine life, caused the collapse of the fishing industry and created noxious sights and smells. The creation of this harm and nuisance is specifically alleged to raise a federal question. Thus, Count I sounds in federal common law nuisance.

The defendants assert that private parties, such as the plaintiffs, have no standing to raise a claim in federal common law nuisance. The authorities support defendants' position. In *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972), the Supreme Court held that the states could sue on a theory of federal common law nuisance to abate the pollution of interstate waters. The Court cited *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907), which spoke of the necessity of allowing to states an avenue for judicial resolution of interstate disputes because when the states joined the Union, they gave up their right to forcibly abate nuisances created in other states. *Illinois* v.

Milwaukee, supra, at 104. The opinion quoted further language from the same case to the effect that the Court found it reasonable to enforce a sovereign's demand to be protected from pollution from an extra-state source, notwithstanding the Court's hesitancy to hear a suit between private parties predicated on a federal common law theory. *Id.* at 104-05. Lower courts have refused to extend a right of action in federal nuisance to private parties. *Parsell* v. *Shell Oil Co.,* 421 F.Supp. 1275 (D. Conn. 1976); *Committee for the Consideration of the Jones Falls Sewerage System* v. *Train,* 375 F.Supp. 1148 (D. Md. 1974), *aff'd on different but not inconsistent grounds,* 539 F.2d 1006 (4th Cir. 1976). Plaintiffs have cited no cases to the contrary. It appears that plaintiffs have no standing to raise their federal common law nuisance claim, and Count I must be dismissed.

II

Count II charges the New York and New Jersey defendants and USACE with dumping into the Atlantic and the Hudson River refuse other than that flowing from the streets and sewers in a liquid state in violation of section 13 of the Rivers and Harbors Act of 1899 (Refuse Act), 33 U.S.C. § 407. The defendants take the position that there is no private action under the Refuse Act. Plaintiffs argue that the purpose of the Refuse Act would be advanced by a "private attorney general" action and that such actions have been permitted at least against federal defendants.

The enforcement of the Refuse Act is specifically delegated to the United States, 33 U.S.C. § 413, and it has generally been held that there is no implied private right

of action thereunder. *See, e.g., Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972); *Loveladies Property Owners Association* v. *Raab* (*Loveladies*), 430 F.Supp. 276, 281 (D.N.J. 1975), *aff'd mem.*, 547 F.2d 1162 (3d Cir. 1976); *Township of Long Beach* v. *City of New York* (*Township of Long Beach*), 445 F.Supp. 1203, 1211 & cases cited therein (D.N.J. 1978). However, some courts have found a private right of action under the Refuse Act against federal defendants, *Natural Resources Defense Council* v. *Grant*, 355 F.Supp. 280 (E.D. N.C. 1973); *People of State of Illinois ex rel. Scott* v. *Hoffman*, 425 F.Supp. 71 (S.D. Ill. 1977), on the theory that where the violator is federal, the U.S. Attorney is in no position to enforce the act because he is also charged with the responsibility of defending the violator. *Natural Resources Defense Council* v. *Grant, supra*, at 290.

The rule in this circuit appears to be that there is no private right of action under the Refuse Act regardless of the identity of the defendant. I deduce this from the fact that in *Loveladies, supra*, the Third Circuit affirmed the dismissal of a private cause of action under the act brought against federal and other defendants. *Accord, Township of Long Beach, supra*, at 1212; *Bass Angler Sportsman Society* v. *United States Steel Corp.*, 324 F. Supp. 412, 416 (D. Ala.), *aff'd per curiam sub nom., Bass Anglers Sportsman Society* v. *Koppers Co.*, 447 F.2d 1304 (5th Cir. 1971). *Cf., Red Star Towing and Transportation Co.* v. *Department of Transportation of State of New Jersey*, 423 F.2d 104, 106 (3d Cir. 1970). Thus, plaintiffs' claims in Count II must fall.

III

In Counts III, IV, VIII and IX, the various defendants are charged with violations of FWPCAA and/or MPRSA. Count III alleges that the federal defendants have violated MPRSA. Count IV charges USEPA and Train with violations of FWPCAA. Count VIII alleges that the New York and New Jersey defendants have violated FWPCAA, MPRSA, New York Environmental Conservation Law, New Jersey Conservation and Development Law and permits issued by USEPA, USACE or NYDEC. Count IX charges the federal defendants with negligently carrying out their discretionary functions under FWPCAA, MPRSA and NEPA and further alleges that USACE conducted its dredging activities negligently.

Private actions to enforce FWPCAA and MPRSA are authorized by citizens' suit provisions in each act, 33 U.S.C. §1365(a), (b) and (c) [7] and 33 U.S.C. § 1415(g)[8] respec-

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[7] 33 U.S.C. § 1365 provides:

> (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
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> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
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> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

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The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) No action may be commenced—

(1) under subsection (a) (1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a) (2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) (1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(Footnote continued on following page)

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(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

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[8] 33 U.S.C. § 1415(g) provides:

(g)(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any prohibition, criterion, or permit established or issued by or under this subchapter. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such prohibition, limitation, criterion, or permit, as the case may be.

(2) No action may be commenced—

(A) prior to sixty days after notice of the violation has been given to the Administrator or to the Secretary, and to any alleged violator of the prohibition, limitation, criterion, or permit; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with the prohibition, limitation, criterion, or permit; or

(C) if the Administrator has commenced action to impose a penalty pursuant to subsection (a) of this section, or if the Administrator, or the Secretary, has initiated permit revocation or suspension proceedings under subsection (f) of this section; or

(D) if the United States has commenced and is diligently prosecuting a criminal action in a court

tively. The two citizens' suit provisions are substantially the same. Each contains a notice clause providing that no actions may be commenced under the citizens' suit provision except upon giving notice to the alleged violator of the act in compliance with the terms of the act and regulations thereunder.

All the defendants argue that plaintiffs have failed to give the requisite notice that therefore this court has no jurisdiction over plaintiffs' WFPCAA and MPRSA claims. Plaintiffs retort that service of the complaint constitutes substantial compliance with the notice provision. Further, they argue that the court has alternative jurisdiction over these citizens' claims under 28 U.S.C. § 1331, and that in a § 1331 citizens' suit the notice provisions of 33 U.S.C. §§ 1365 and 1415 do not apply. Because the questions of the sufficiency of notice and the availability of alternative jurisdiction without the requirement of notice are threshold issues common to Counts III, IV, VIII and IX, I shall treat those counts together. I shall first consider the FWPCAA claims, then the MPRSA claims, and finally any remaining issues in each of the four counts.

Under FWPCAA, citizens' actions may be brought against anyone who fails to comply with an effluent standard, limitation or order issued under the act, 33 U.S.C. § 1365(a)(1), or against the USEPA Administrator for failure to perform a non-discretionary duty mandated by the act, 33 U.S.C. § 1365(a)(2). No citizens' action may be commenced without prior notice to the alleged act violator in accordance with USEPA regulations, and, except in circumstances not here relevant, notice must be given at least 60 days before the commencement of the action. 33 U.S.C. § 1365(b). Notice to the alleged violator in a § 1365(a)(1) suit must specify the standard, limitation or

order allegedly violated. 40 C.F.R. § 135.3 (1977). Notice to the USEPA Administrator in a § 1365(a)(2) suit must specify the statutory provision claimed to have been transgressed. *Id.* Plaintiffs have failed to give notice to any defendant which satisfies FWPCAA requirements. To the extent notice was given at all, it was untimely and failed to specify any standard, limitation, order or statuory section purportedly violated. Since strict compliance with the notice provisions of 33 U.S.C. § 1365 is required, *Loveladies, supra,* this court does not have jurisdiction of any FWPCAA claims under 33 U.S.C. § 1365.

Plaintiffs take the position that 28 U.S.C. § 1331 provides an alternative basis for jurisdiction. They base their argument on the savings clause of FWPCAA, 33 U.S.C. § 1365(e), which provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

They urge that the only interpretation of FWPCAA which gives proper effect to the savings clause is on that finds an implied right of action for private parties to enforce FWPCAA unfettered by the notice requirements of § 1365 (b) which right may be exercised by grounding jurisdiction on the "arising under" jurisdictional statute.

There is a split among the circuits on the issue whether the virtually identical citizens' suit provisions of FWP CAA, MPRSA and the Clean Air Act, as amended, 42 U.S.C. § 1857 *et seq.* (1969), 42 U.S.C. § 1857h-2 (Supp. 1977), are the exclusive jurisdictional base for private

actions to enforce said environmental legislation. The D.C. and Second Circuits have held that the FWPCAA provision is not exclusive, and jurisdiction may be predicated alternatively on 28 U.S.C. § 1331 without compliance with the citizens' suit notice requirement. *Natural Resources Defense Council, Inc.* v. *Train (NRDC* v. *Train),* 510 F.2d 692 (D.C. Cir. 1974), *as modified,* (D.C. Cir. 1975); *Natural Resources Defense Council, Inc.* v. *Callaway,* 524 F.2d 79 (2d Cir. 1975). The Seventh Circuit has held squarely to the contrary with regard to the citizens' suit provisions of the Clean Air Act. *Ctiy of Highland Park* v. *Train, (Highland Park),* 519 F.2d 681 (7th Cir. 1975). Another court in this district has followed the lead of the D.C. and Second Circuits on this issue in a FWP CAA and MPRSA context. *Township of Long Beach, supra* (Fisher, J.).

In *Highland Park, supra,* Judge Tone, writing for the court, noted that

> [t]he legislative history of section 304 [42 U.S.C. § 1857h-2 (citizens' suit provision)] shows Congress's determination that citizen participation in the enforcement of standards and regulations under the Clean Air Act of 1970 be established. It also shows, however, that Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened Federal Courts and most likely to trigger governmental action which would alleviate any need to for judicial relief. It was in response to these concerns that the statutory notice provisions were included in section 304. Congress's intention would be frustrated if the statutory mandate of section 304(b) were ignored.

Id. at 690-91. Later, in discussing *NRDC* v. *Train, supra,* which is cited without analysis as persuasively precedent in *Natural Resources Defense Council* v. *Callaway, supra,* Judge Tone indicated

> [i]n [*NRDC* v. *Train*], 510 F.2d 692, 698-703 (D.C. Cir. 1975), the majority held that under the Federal Water Pollution Control Act, the pertinent provisions of which are substantially the same as those of the Clean Air Act, judicial review could be obtained . . . under 28 U.S.C. § 1331 . . ., and refers to the Clean Air Act and its legislative history as a basis for its holding. The majority's opinion . . . bases its holding on the saving provision of the Federal Water Pollution Control Act, 33 U.S.C. § 1365(e), which is substantially the same as the saving provision in section 304 of the Clean Air Amendments of 1970, 42 U.S.C. § 1857h-2(e), and the statments in the legislative history that other remedies were not impaired by the act. The opinion does not give any reasons for the court's . . . holding that jurisdiction was . . . conferred by 28 U.S.C. § 1331. Judge Robb's dissent argues that the 60-day notice requirement should control.

Id. at 693. The Seventh Circuit ultimately concluded that

> [t]he saving provision, expressing the general intention of Congress not to disturb existing rights to seek relief, does not have the affirmative effect of removing conditions which existing law imposes upon the exercise of those rights.

Id. at 693.

I concur in the Seventh Circuit's analysis of the citizen suit provision. While the saving clause of FWPCAA, 33

U.S.C. § 1465(e), may indeed make § 1331 available to an alternative basis for jurisdiction, it does not, in addition, provide a basis to imply a citizens' right of action under FWPCAA on terms and conditions different from those specifically delineated by Congress. The manifest purpose of the savings clause seems to be the preservation of existing rights, not the creation of new ones. Thus, satisfaction of the notice requirements is an unavoidable prerequisite to a citizens' suit. Since plaintiffs have failed to give the notice required by FWPCAA and the regulations thereunder, their FWPCAA claims must fail.

Because the MPRSA citizens' suit provisions, including the notice requirements, are identical to those of FWP CAA in all relevant respects, I have no jurisdiction over plaintiffs' MPRSA claims for the aforementioned reasons. Thus, Counts III and IV must be dismissed in their entirety, and Counts VIII and IX are dismissed insofar as they allege FWPCAA and MPRSA claims.

The claims remaining in Count VIII allege that the New York and New Jersey defendants have violated New York Environmental Conservation Law, permits issued by NYDEC and New Jersey Conservation and Development Law. These are state law claims which will be discussed in XI, *infra.*

Left in Count IX are claims that the federal defendants negligently conducted their discretionary functions under NEPA and that USACE conducted its dredging activities negligently. Violations of NEPA may be reviewed by the courts pursuant to the APA, except insofar as the APA exempts certain functions from review. *See Environmental Defense Fund* v. *Corps of Engineers, U.S. Army,* 470 F.2d 289, 298-300 (8th Cir. 1972). However,

discretionary functions are reviewable under the APA, 5 U.S.C. § 706, only where the agency or officer exceeds the limits of discretion established by Congress. *SEC* v. *Republic National Life Insurance Co.*, 383 F.Supp. 436, 438 (S.D.N.Y. 1974); *International Waste Controls, Inc.* v. *SEC*, 362 F.Supp. 117 (S.D.N.Y. 1973), *aff'd per curiam*, 485 F.2d 1238 (2d Cir. 1973). Since no such excess has been alleged, I have no jurisdiction over this NEPA claim. As to the claim of negligent dredging, this claim sounds in tort, and for reasons more fully set forth in IX, *infra*, plaintiffs are precluded by the Federal Tort Claims Act from suing USACE with regard to the conduct alleged in the complaint. Thus, Count IX must be dismissed.

IV

In Count VII, plaintiffs allege that USEPA and Train have violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, in that

> [d]espite the continued and increasing discharge of pollutants into the Hudson River, New York Harbor and Atlantic Ocean, defendants have failed to develop, plan, and coordinate federal functions, programs, and resources to the end that the marine environment of the Atlantic Ocean might exist without degradation, and that those who use the marine environment might do so without risk to health or safety or other undesirable and unintended consequences.

Complaint ¶ 71.

The defendants correctly argue that USEPA and its Administrator are specifically exempted by FWPCAA

from NEPA requirements, except as regards (1) grants for construction of treatment works and (2) the issuance of new source permits. 33 U.S.C. § 1371(c). Plaintiffs have offered no rebuttal on this point. Since neither of the non-exempt functions are alleged in Count VII, this count fails to state a claim upon which relief may be granted.

V

Count X charges that all the defendants, by action or inaction, have caused "unreasonable degradation of the marine environment" in which there is a public right protected by the fifth, ninth and fourteenth amendments.

The defendants argue that these allegations fail to state a claim because there is no constitutionally protected right to a clean, unpolluted environment. Plaintiffs cite no cases in support of their position that such right exists. Indeed, the courts have consistently held to the contrary. *Ely* v. *Velde,* 451 F.2d 1130, 1139 (4th Cir. 1971); *Township of Long Beach, supra,* at 1212 & cases cited therein. Consequently, Count X must be dismissed.

VI

Count XI alleges that the New York and New Jersey defendants and USACE, by their polluting conduct, have taken and destroyed property held in trust for the public benefit in violation of the prohibition of the fifth amendment of the Constitution of the United States against the taking of private property for public use without just compensation. The defendants argue that plaintiffs have no property right in coastal waters and marine life. Plaintiffs take no position on this point.

It is settled law that the states have title to the coastal waters and marine life within their boundaries, including the seabeds and beds of all tidal waters, within three miles of the coast, while title to the waters beyond three miles from the coast is in the United States. *McCready* v. *Virginia,* 94 U.S. 391 (1876); *U.S.* v. *Florida,* 425 U.S. 791 (1976); Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.* (1964), 43 U.S.C. §§ 1311(a) and 1332. Individual citizens have no property interest in the sea waters, sea beds or marine life. *Burgess* v. *M/ Tamano,* 370 F.Supp. 247, 249 (S.D. Me. 1973). Thus, plaintiffs have no interest protected from condemnation without compensation by the fifth amendment, and Count XI must be dismissed.

VII

Plaintiffs' complaint lists 42 U.S.C. § 1983 as one of the statutes upon which this action is grounded. No specific allegations of facts supporting a § 1983 claim have been made, however. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Since § 1983 requires state action, any claim under that provision against the federal defendants must be dis-

missed. As to the New York and New Jersey defendants, plaintiffs have failed to plead any right protected by the Constitution[9] at stake in this action. *See* V, VI, *supra.* Nor have plaintiffs alleged any statutory right, privilege or immunity deprived by state action. The various environmental statutes at issue here do not create rights to a clean environment. To the extent they vest private parties with any special interests, they create rights of action to enforce certain statutory provisions. The plaintiffs have not alleged that the state defendants have interfered with the exercise of such rights or action. Thus, any § 1983 claim of the plaintiffs must fall.

VIII

Plaintiffs have pleaded the Extension of Admiralty and Maritime Jurisdiction Act, 42 U.S.C. § 740, as one of the bases for this action, but again they have failed to make any factual allegations in support of such claim. Section 740 provides in part that

> [t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

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[9] Plaintiffs have listed the supremacy clause, art. VI, cl. 2, as one of the many legal bases for this action, but have failed to allege how the provision is implicated in the issues presented. In any case, the supremacy clause does not confer on the plaintiffs any independent right relevant to the matters alleged in the complaint.

Hence, only defendants' polluting activities conducted from ships causing damage on land would be actionable under this provision. In addition, the section specifically requires damage "to person or property." Plaintiffs have alleged no personal injury in their complaint. Nor have they cited any authority which suggests that any of the alleged wrongful conduct caused damage on land which is cognizable under 42 U.S.C. § 740 in admiralty. Thus, plaintiffs have failed to state a cause of action under this section.

IX

Plaintiffs have listed admiralty, 28 U.S.C. § 1333(1), as one of the jurisdictional bases for this action. Some courts have indicated that a commercial fisherman's allegation that polluting activities have caused damage to his fishing operation states a claim for tortious interference with a public right, a public nuisance cause of action cognizable as a maritime tort in admiralty. *Potomac River Association, Inc.* v. *Lundeberg Maryland Seamanship School, Inc.* (*Potomac River*), 402 F.Supp. 344, 358 (D. Md. 1975); *Burgess* v. *M/V Tamano* (*M/V Tamano*), *supra,* at 250. In brief, the theory is that while a public nuisance is usually actionable only by the state, a private individual may recover for invasions of the public right if he can show damage of a different kind—not merely of a different degree—from that of the public generally. Commercial fishermen have been held to have such a special interest in the pollution of marine waters. *M/V Tamano, supra,* at 250. Torts are cognizable in admiralty where the activity of the injured party bears a significant relationship to a traditional maritime activity. *Executive Jet Aviation, Inc.* v. *Cleveland,* 409 U.S. 249

(1973); *Union Oil Co.* v. *Oppen,* 501 F.2d 558 (9th Cir. 1974); *Potomac River, supra,* at 358. Since fishing is a traditional maritime activity, tortious damage to fishing by pollution is actionable as a maritime tort. *Potomac River, supra,* at 358. Of course, polluting activities which are in conformity with permits or regulations under pertinent environmental statutes are immunized from tort liability. Id. at 359.

Plaintiffs have not pleaded a claim in this maritime tort, nor have they requested that their complaint be construed to allege such a cause of action. Therefore, I decline to read such a claim into their pleadings. However, even if plaintiffs had raised such a claim, except as to one defendant, their cause of action would have run aground on the shoals of the notice provisions of various tort claims acts.

The federal agency and the state agency defendants are arms of their respective sovereigns, and, hence, are subject to suit in tort only in accordance with the conditions of the waiver of sovereign immunity specified in the tort claims act of each respective sovereign. *See* N.Y. Gen. Mun. Law §§ 50-i, 50-e (McKinney 1977, § 50-i; The New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.* (Supp. to Title 58, 1977), N.J.S.A. 59:1-3; the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and 28 U.S.C. § 2671 *et seq.,* 28 U.S.C. §§ 1346(b) and 2676. The two federal individual defendants and the mayor of the City of New York, to the extent each acted within the scope of his employment, also enjoy the protection of their respective tort claims act. *See* 28 U.S.C. §§ 1346(b) and 2679(a); N.Y. Gen. Mun. Law § 50-i(1) (McKinney). Each of the three tort claims acts requires the submission of notice of plaintiffs' claim as a predicate to suit.

New York requires that notice be given to the defendant within 90 days of the accrual of the cause of action, § 50-e(1)(a), and that thereafter 30 days must elapse before the commencement of suit, § 50-i(1). Here, the alleged damage occurred in the summer of 1976. New York City received notice on November 29, 1976, and the action was filed on January 14, 1977. None of the other New York defendants received notice, if they got it at all, until March 25, 1977. Hence, only New York City received timely notice. Although application may be made to the court for late notice, § 50-e(5), plaintiffs have made no such effort. Further, leave to grant such application is within the discretion of the court, and since plaintiffs have offered no explanation for their tardiness, I would be disinclined to grant plaintiffs' relief. Mayor Beame was not sued in an individual capacity, and no allegations have been made that he exceeded the scope of his authority. Thus, of the New York defendants, only New York City is subject to tort suit.

The New Jersey Tort Claims Act requires a claim to be presented to the defendant entity within 90 days of accrual of the cause of action. N.J.S.A. 59:8-8. Application for late filing may be made only up to one year after the accrual of the claim. N.J.S.A. 59:8-9. Plaintiffs have failed to give notice to any New Jersey defendant, except possibly Middlesex County Sewerage Authority. Assuming plaintiffs served a notice on Middlesex on the date they claim, said notice was not timely. No timely application for late filing was made. Thus, plaintiffs are forever barred from bringing these tort claims against the New Jersey defendants. *See* N.J.S.A. 59:8-8(a); *Pinckney* v. *City of Jersey City,* 140 N.J. Super. 96 (Law Div. 1976).

The Federal Torts Claims Act requires that would-be plaintiffs file an appopriate claim with the defendant agency and then wait for six months before commencing suit. 28 U.S.C. § 2675(a). The claim must state a sum certain, 40 C.F.R. § 10.2(a) (1977), and one which does not is a nullity. *Bialowa* v. *U. S.*, 443 F.2d 1047, 1050 (3d Cir. 1971). Plaintiffs served their letter notice on USACE, Hoffman and Train on January 3, 1977, and a formal tort claim on USEPA on March 22, 1977. Neither form of notice stated a sum certain, and neither was served six months before suit. The fact that service was not effective on the federal defendants until 10 months after the filing of the complaint does not cure plaintiffs' notice defects. *See Gunstream* v. *U.S.*, 307 F.Supp. 366, 369 (C.D. Cal. 1969). Thus, plaintiffs' tort claims are barred by the Federal Tort Claims Act against USEPA, USACE and against the individual federal defendants to the extent they acted within the scope of their employment.

The complaint recites that Hoffman and Train acted outside the scope of their authority.[10] Complaint ¶¶ 55, 59. The virtually identical language of the pertinent paragraphs provides:

> (d) Defendant [referring to all the federal defendants or Train and USEPA] have repeatedly exceeded their authority as expressly provided in [FWPCAA or MPRSA].
>
> (e) In particular, defendants have taken no action, despite enforcement powers, to object to or to

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[10] Federal officials do not have absolute immunity for conduct which is in excess of statutory authority or in violation of the Constitution. *Butz* v. *Economou*, —— U.S. ——, 46 U.S.L.W. 4952 (June 29, 1978).

set aside the granting of and approval of permits issued to conduct ocean dumping operations as described in Count I above.

Enforcement of FWPCAA and MPRSA turns on a host of discretionary functions. Since the pleading fails to state that Hoffman and Train exceeded the scope of their statutory discretionary powers, I construe paragraphs 55 and 59 to allege only abuse of discretion on the part of the individual defendants. Thus, the complaint does not present a claim that they acted beyond the scope of their employment, and they are protected by the Federal Tort Claims Act.

X

Plaintiffs' final federal claim is one in mandamus, 28 U.S.C. §1361. Mandamus is an extraordinary remedy, available only where governmental officials have clearly failed to perform non-discretionary duties. *Loveladies, supra,* at 282; *Carter* v. *Seamans,* 411 F.2d 767, 773 (5th Cir. 1969), *cert. denied,* 397 U.S. 941 (1969). Mandamus is not available where an adequate alternative remedy exists. *Ex Parte Republic of Peru,* 318 U.S. 578, 584 (1943); *Richardson* v. *U.S.,* 465 F.2d 844, 849 (3d Cir. 1972), *rev'd on other grounds,* 418 U.S. 166 (1974). Plaintiffs have alleged that the various defendants have failed to comply with non-discretionary duties under various federal and state environmental statutes and permits issued thereunder. As to any pertinent FWPCAA and MPRSA violations, the citizens' suit provisions of those acts provide a means to compel performance of non-discretionary duties. Plaintiffs have failed to show that the citizens' suit notice provisions render those remedies inadequate. Failure to per-

form non-discretionary NEPA duties not exempted from liability by other statutes may be reviewed pursuant to the APA, 5 U.S.C. § 701 *et seq.* Section 13 of the Refuse Act, 33 U.S.C. § 407, is a criminal provision which imposes only a discretionary duty of enforcement on the U.S. Department of Justice. *See* 33 U.S.C. § 413. None of the other statutes pleaded appear to create any duties obligatory to any of the defendants herein. Therefore, plaintiffs have failed to state a valid claim in mandamus.

XI

The remaining counts are pendant state law claims. Count XII charges all the defendants with creating a nuisance. Count XIII charges the New York and New Jersey defendants and USACE with trespass and damage to property held in public trust. Since plaintiffs' federal claims have all been dismissed, there is no basis for pendant jurisdiction, *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966), and these remaining counts must fall. To the extent that Count VIII raises pendant claims for violation of the New York Environmental Conservation Law, the New Jersey Conservation and Development Law and permits issued thereunder, these claims must also be dismissed. Since the disposition on the motions for summary judgment has mooted the crossclaims for indemnity, such crossclaims are dismissed as well.

It should be noted, however, that because plaintiffs have no ownership interest in the marine environment and ocean life, they have no standing to sue in ordinary nuisance, trespass or for damage to property held in public trust. They could, however, raise a claim sounding in tortious interference with a public right. *See* IX, *supra.*

In addition, because plaintiffs failed to comply with the notice provisions of the various tort claims acts, they are precluded from suing in tort against any of the defendants except New York City. *See* IX, *supra.*

The movants will prepare individuals orders[11] in conformity with this decision, and submit them, with consent as to form, within 15 days of the date of this opinion.

Dated: August 14, 1978.

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[11] Since the claims against West Long Beach Sewer District and the County of Westchester are no different from those against the other New York defendants who received no special notice of plaintiffs' action, said claims are not viable for the reasons set forth in this opinion. Counsel for Glen Cove will kindly prepare an order dismissing the action as to these two defendants.

Order of the District Court

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

CIVIL ACTION No. 77-126

NATIONAL SEA CLAMMERS ASSOCIATION, etc., et al,

Plaintiffs,

v.

CITY OF NEW YORK, etc., et al,

Defendants.

For the reasons set forth in the opinion of the court dated August 14, 1978,

IT IS on this 9th day of January 1979 ORDERED as follows:

1. Count I of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs;

2. Count II of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

3. Count III of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

4. Count IV of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

5. Count VII of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

6. Count VIII of the complaint herein is dismissed in its entirety as to all defendants named therein with costs and with prejudice as to all claims asserted therein that arise under federal law, but without prejudice as to all claims therein that arise under the law of any state.

7. Count IX of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

8. Count X of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

9. Count XI of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

10. Count XII of the complaint herein is dismissed without prejudice but with costs.

11. Count XIII of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice, except as to defendant New York City the dismissal is without prejudice, but with costs as to all defendants.

12. All crossclaims are hereby dismissed as moot, but without costs.

H. CURTIS MEANOR
U.S.D.J.

Constitutional Provision and Statutes Involved

Eleventh Amendment to Constitution of the United States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. §1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *

28 U.S.C. §1291

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. §1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or

value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision thereof is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any set off or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. §1333

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

33 U.S.C. §407

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing there-

from in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

33 U.S.C. §1251

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the

permit programs under section 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

* * *

(g) * * * Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Constitutional Provision and Statutes Involved

33 U.S.C. §1311

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to

any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant ot section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compiance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) not later than July 1, 1938, compliance by all pubicly owned treatemtn works with the requirements set forth in section 1281(g)(2) of this title;

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transpotation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than three years after the date such limitations are established;

(E) not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordane with regulations issued by the Adminitrator pursuant to section 1314 (b)(4) of this title; and

(F) for all polutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations

are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

* * *

(h) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant in an existing discharge from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;

(2) such modified requirements will not interfere with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(7) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(8) any funds available to the owner of such treatment works under subchapter II of this chap-

ter will be used to achieve the degree of effluent reduction required by section 1281(b) and (g)(2)(A) of this title or to carry out the requirements of this subsection.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the continguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title.

* * *

(k) In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the sys-

tems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) of this section no later than July 1, 1987, if it is also determined that such innovative system has the potential for industrywide application.

(*l*) The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

33 U.S.C. §1316

* * *

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedures required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulga-

tion. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provision of this section shall apply to any new source owned or operated by the United States.

(c) Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

(d) Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period

of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of Title 26, whichever period ends first.

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source in violation of any standard of performance applicable to such source.

33 U.S.C. §1317

* * *

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period

of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standard (or prohibition) with such modification as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after December 27, 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternative change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall effect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

(c) In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 1316 of

this title if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 1316 of this title for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

* * *

(7) Prior to establishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

(b)(1) The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant

through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works. If, in the case of any toxic pollutant under subsection (a)of this section introduced by a source into a publicly owned treatment works, the treatment by such works removes all or any part of such toxic pollutant and the discharge from such works does not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by such source other than through a publicly owned treatment works, and does not prevent sludge use or disposal by such works in accordance with section 1345 of this title, then the pretreatment requirements for the sources actually discharging such toxic pollutant into such publicly owned treatment works may be revised by the owner or operator of such works to reflect the removal of such toxic pollutant by such works.

33 U.S.C. §1341

(a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or

other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other

State determine that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction

license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such li-

cense or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

* * *

(d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with

any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. §1343

(a) No permit under section 1342 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior to the promulgation of such guidelines, a permit may be issued under such section 1342 of this title if the Administrator determines it to be in the public interest.

(b) The requirements of subsection (d) of section 1342 of this title may not be waived in the case of permits for discharges into the territorial sea.

(c)(1) The Administrator shall, within one hundred and eighty days after October 18, 1972 (and from time to time thereafter), promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

(A) the effect of disposal of pollutants on human health or welfare, including but not limited to

plankton, fish, shellfish, wildlife, shorelines, and beaches;

(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their by-products through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal at varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 1342 of this title.

Constitutional Provision and Statutes Involved

33 U.S.C. §1345

(a) Notwithstanding any other provision of this chapter or of any other law, in any case where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 1292 of this title (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 1342 of this title.

(b) The Administrator shall issue regulations governing the issuance of permits for the disposal of sewage sludge subject to subsection (a) of this section and section 1342 of this title. Such regulations shall require the application to such disposal of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title.

(c) Each State desiring to administer its own permit program for disposal of sewage sludge subject to subsection (a) of this section within its jurisdiction may do so in accordance with section 1342 of this title.

(d) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after December 27, 1977, and from time to time thereafter, regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall—

(1) identify uses for sludge, including disposal;

(2) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs);

(3) identify concentrations of pollutants which interfere with each such use or disposal.

The Administrator is authorized to revise any regulation issued under this subsection.

(e) The determination of the manner of disposal or use of sludge is a local determination except that it shall be unlawful for the owner or operator of any publicly owned treatment works to dispose of sludge from such works for any use for which guidelines have been established pursuant to subsection (d) of this section, except in accordance with such guidelines.

33 U.S.C §1365

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controvery or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standards, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this sec-

tion respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

* * *

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

* * *

(g) For the purpose of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

33 U.S.C. §1401

(a) Unregulated dumping of material into ocean waters endangers human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities.

(b) The Congress declares that it is the policy of the United States to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

(c) It is the purpose of this chapter to regulate (1) the transportation by any person of material from the United States and, in the case of United States vessels, aircraft, or agencies, the transportation of material from a location outside the United States, when in either case the transportation is for the purpose of dumping the material into ocean waters, and (2) the dumping of material transported by any person from a location outside the United States, if the dumping occurs in the territorial sea or the contiguous zone of the United States.

33 U.S.C. §1411

(a) Except as may be authorized by a permit issued pursuant to section 1412 or section 1413 of this title, and subject to regulations issued pursuant to section 1418 of this title,

> (1) no person shall transport from the United States, and
>
> (2) in the case of a vessel or aircraft registered in the United States or flying the United States flag or in the case of a United States department, agency, or instrumentality, no person shall transport from any location

any material for the purpose of dumping it into ocean waters.

(b) Except as may be authorized by a permit issued pursuant to section 1412 of this title, and subject to regulations issued pursuant to section 1418 of this title, no person shall dump any material transported from a location outside the United States (1) into the territorial sea of the United States, or (2) into a zone contiguous to the territorial sea of the United States, extending to a line twelve nautical miles seaward from the base line from which the breadth of the territorial sea is measured, to the extent that it may affect the territorial sea or the territory of the United States.

33 U.S.C. §1412

(a) Except in relation to dredged material, as provided for in section 1413 of this title, and in relation to radiological, chemical, and biological warfare agents and high-level radioactive waste, for which no permit may be issued, the Administrator may issue permits, after notice and opportunity for public hearings, for the transportation from the United States or, in the case of an agency or instrumentality of the United States, or in the case of a vessel or aircraft registered in the United States or flying the United States flag, for the transportation from a location outside the United States, of material for the purpose of dumping it into ocean waters, or for the dumping of material into the waters described in section 1411(b) of this title, where the Administrator determines that such dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine

environment, ecological systems, or economic potentialities. The Administrator shall establish and apply criteria for reviewing and evaluating such permit applications, and, in establishing or revising such criteria, shall consider, but not be limited in his consideration to, the following:

(A) The need for the proposed dumping.

(B) The effect of such dumping on human health and welfare, including economic, esthetic, and recreational values.

(C) The effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches.

(D) The effect of such dumping on marine ecosystems, particularly with respect to—

(i) the transfer, concentration, and dispersion of such material and its byproducts through biological, physical, and chemical processes,

(ii) potential changes in marine ecosystem diversity, productivity, and stability, and

(iii) species and community population dynamics.

(E) The persistence and permanence of the effects of the dumping.

(F) The effect of dumping particular volumes and concentrations of such materials.

(G) Appropriate locations and methods of disposal or recycling, including land-based alternatives and the probable impact of requiring use of such

alternate locations or methods upon considerations affecting the public interest.

(H) The effect on alternate uses of oceans, such as scientific study, fishing, and other living resource exploitation, and nonliving resource exploitation.

(I) In designating recommended sites, the Administrator shall utilize wherever feasible locations beyond the edge of the Continental Shelf.

In establishing or revising such criteria, the Administrator shall consult with Federal, State, and local officials, and interested members of the general public, as may appear appropriate to the Administrator. With respect to such criteria as may affect the civil works program of the Department of the Army, the Administrator shall also consult with the Secretary. In reviewing applications for permits, the Administrator shall make such provision for consultation with interested Federal and State agencies as he deems useful or necessary. No permit shall be issue for a dumping of material which will violate applicable water quality standards. To the extent that he may do so without relaxing the requirements of this subchapter, the Administrator, in establishing or revising such criteria, shall apply the standards and criteria binding upon the United States under the Convention, including its Annexes.

(b) The Administrator may establish and issue various categories of permits, including the general permits described in section 1414(c) of this title.

(c) The Administrator may, considering the criteria established pursuant to subsection (a) of this section, des-

ignate recommended sites or times for dumping and, when he finds it necessary to protect critical areas, shall, after consultation with the Secretary, also designate sites or times within which certain materials may not be dumped.

(d) No permit is required under this subchapter for the transportation for dumping or the dumping of fish wastes, except when deposited in harbors or other protected or enclosed coastal waters, or where the Administrator finds that such deposits could endanger health, the environment, or ecological systems in a specific location. Where the Administrator makes such a finding, such material may be deposited only as authorized by a permit issued by the Administrator under this section.

(e) In the case of transportation of material, by a vessel or aircraft registered in the United States or flying the United States flag, from a location in a foreign State Party to the Convention, a permit issued pursuant to the authority of that foreign State Party, in accordance with Convention requirements, and which otherwise could have been issued pursuant to subsection (a) of this section, shall be accepted, for the purposes of this subchapter, as if it were issued by the Administrator under the authority of this section.

33 U.S.C. §1412a.

(a) The Administrator of the Environmental Protection Agency (hereinafter referred to in this section as the "Administrator") shall end the dumping of sewage sludge into ocean waters, or into waters described in section 1411 (b) of this title, as soon as possible after November 4, 1977, but in no case may the Administrator issue any per-

mit, or any renewal thereof (under Title I of the Marine Protection, Research, and Sanctuaries Act of 1972) which authorizes any such dumping after December 31, 1981.

(b) For purposes of this section, the term "sewage sludge" means any solid, semisolid, or liquid waste generated by a municipal waste-water treatment plant the ocean dumping of which may unreasonably degrade or endanger human health, welfare, amenities, or the marine environment, ecological systems, or economic potentialities.

33 U.S.C. §1415

(g)(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any prohibition, limitation, criterion, or permit established or issued by or under this subchapter. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such prohibition, limitation, criterion, or permit, as the case may be.

(2) No action may be commenced—

(A) prior to sixty days after notice of the violation has been given to the Administrator or to the Secretary, and to any alleged violator of the prohibition, limitation, criterion, or permit; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court

of the United States to require compliance with the prohibition, limitation, criterion, or permit; or

(C) if the Administrator has commenced action to impose a penalty pursuant to subsection (a) of this section, or if the Administrator, or the Secretary, has initiated permit revocation or suspension proceedings under subsection (f) of this section; or

(D) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of this subchapter.

* * *

(3)(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Administrator or Secretary, may intervene on behalf of the United States as a matter of right.

* * *

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency).

42 U.S.C. §7604

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation

occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limition, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(c)(1)(B) of this title or an order issued by the Administrator pursuant to section 1413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

* * *

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Adminstrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

> (2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernment entities, see section 7418 of this title.

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N.J.S.A. 59:1-2

The Legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand the Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carry out the above legislative declaration.

Constitutional Provision and Statutes Involved

N.J.S.A. 59:1-3

* * *"Public entity" includes the State and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.

"State" shall mean the State and any office, department, division, bureau, board, commission or agency of the State, but shall not include any such entity which is statutorily authorized to sue and be sued.

N.J.S.A. 59:2-1

a. Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

b. Any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person.

N.J.S.A. 59:8-3

No action shall be brought against a public entity under this act unless the claim upon which it is based shall have been presented in accordance with the procedure set forth in this chapter.

N.J.S.A. 59:8-8

A claim relating to a cause of action for death or for injury to person or to property shall be presented as provided in this chapter not later than the ninetieth day after

accrual of the cause of action. After the expiration of 6 months from the date notice of claim is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity if:

a. He failed to file his claim with the public entity within 90 days of accrual of his claim except as otherwise provided in section 59:8-9; or

* * *

N.J.S.A. 40:14A-7

Every Sewerage Authority shall be a public body politic and corporate constituting a political subdivision of the State established as an instrumentality exercising public and essential governmental functions to provide for the public health and welfare and shall have perpetual succession and have the following powers:

(1) To adopt and have a common seal and to alter the same at pleasure;

(2) To sue and to be sued;

* * *